Supreme Court, U. S.
FILED
JAN 4 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-926

LAREDO NEWSPAPERS, INC.,

Petitioner,

v.

JOHN E. FOSTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

GEORGE P. KAZEN
Mann, Castillon, Freed & Kazen
Post Office Box 820
Laredo, Texas 78040
(512) 723-5581

Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
1. THE TEXAS SUPREME COURT HAS PLACED AN UNWARRANTED AND UNPRECEDENTED RESTRICTION ON THE FREEDOM OF THE PRESS TO CRITICIZE PUBLIC OFFICIALS, IN DIRECT VIOLATION OF PRIOR RULINGS OF THE UNITED STATES SUPREME COURT	7
2. THE TEXAS SUPREME COURT SERIOUSLY MISINTERPRETED PRIOR DECISIONS OF THIS COURT BY HOLDING THAT A PROFESSIONAL CONSULTANT PAID BY PUBLIC FUNDS TO ADVISE A GOVERNMENTAL BODY ON A MATTER OF PUBLIC CONCERN WAS NOT AT LEAST A "PUBLIC FIGURE"	10
3. THIS CASE WILL ENABLE THE UNITED STATES SUPREME COURT TO DEFINE THE LIABILITY STANDARD WHICH THE STATES MAY ADOPT IN SUITS INVOLVING A DEFAMATION, THE SUBSTANCE OF WHICH DOES NOT MAKE SUBSTANTIAL DANGER TO REPUTATION APPARENT	15
CONCLUSION	17
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:	*Page*
Garrison v. Louisiana, 379 U.S. 64 (1964)	7
Gertz v. Welch, 418 U.S. 323 (1974)	10-13,15
Henry v. Collins, 380 U.S. 356 (1965)	14
Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971)	8
Rosenblatt v. Baer, 383 U.S. 75 (1966)	9,14
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	7
Time, Inc. v. Hill, 385 U.S. 374 (1967)	16
Turley v. W.T.A.X., Inc., 236 N.E.2d 778 (Ill. App. 1968)	13
Other Authorities:	
Prosser on Torts, 2d Ed., Chapter 19 §95	13
Restatement of Torts, Chapter 25 §607	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

LAREDO NEWSPAPERS, INC.,

Petitioner,

v.

JOHN E. FOSTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The Petitioner, Laredo Newspapers, Inc., respectfully prays that a Writ of Certiorari issue to review the Judgement and Opinion of the Supreme Court of Texas entered in this proceeding on July 14, 1976.

BEST COPY AVAILABLE

OPINION BELOW

The opinion of the Supreme Court of Texas is reported in 541 S.W.2d 809. The majority opinion and both dissenting opinions are reproduced in the Appendix hereto. The opinion of the Texas Court of Civil Appeals appears in 530 S.W.2d 611.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on July 14, 1976. A timely Motion for Rehearing was overruled on October 6, 1976, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC §1257(3).

QUESTIONS PRESENTED

1. In a libel suit brought by an elected public official, whether a State Supreme Court can refuse to apply the malice standard on the grounds that the newspaper article contained no reference to the Plaintiff's official position, and therefore did not relate to his official conduct.

2. In a libel suit brought by an elected public official, even if the "official conduct" concept still has any vitality, can the question of whether or not the allegedly libelous statements relate to the Plaintiff's fitness for office be left to a jury to decide as a fact question?

3. Whether a professional engineer hired by a County Commissioners Court and paid with public funds to advise the Court on flooding problems which had caused public complaint is not a "public official" or "public figure" for purposes of a newspaper article concerning those same flooding problems and public complaints merely because he had no personal interest in the problem and did not seek publicity for his role in the controversy.

4. Whether the applicability of the malice standard to libel suits by public officials depends upon the amount of public interest manifested toward that official prior to the alleged libel.

5. Whether an erroneous factual statement that an engineer had platted a certain residential area, in the context of a newspaper article discussing flooding problems in that area, would warn a reasonably prudent editor of its defamatory potential and thus form the basis for civil liability based only on a negligence standard.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent John E. Foster filed a libel suit in the 111th District Court of Webb County, Texas against Petitioner, Laredo Newspapers, Inc., seeking damages as a result of a newspaper article published in *The Laredo Times* on Sunday, June 17, 1973 (a copy of which article is attached in Appendix A hereto).

From 1967 continuously through the time of publication, and in fact to the present time, Foster has been the County Surveyor of Webb County, Texas, filling a post established by Article 5283, Vernon's Annotated Texas Statutes. He was first appointed to the office upon the death of his father, and thereafter has been regularly elected by popular ballot.

In addition, Foster is a licensed civil engineer engaged in private engineering practice in Laredo, Texas. It is undisputed that for at least 13 years prior to the publication, Foster was routinely hired by the County of Webb to handle every major County project requiring the services of an engineer. These projects included construction of the county swimming pool, a proposal to the State Wildlife and Park Department for development of recreational areas, road improvements, a study of long-range paving improvements, proposals connected with the county dam and recreational lake, a study of jail improvements, and design of a children's park.

One such county project involved investigation by Foster of a recurring flooding problem in a residential subdivision known as "Del Mar Hills." In 1972 a citizen had complained to the Commissioners Court of Webb County about this flooding problem. The complaint was promptly referred to Mr. Foster for investigation and study. At a Commissioners Court meeting on June 11, 1973, the same citizen returned to complain about the same problem. Because of his prior study, Mr. Foster was immediately summoned by the Commissioners Court for his advice and opinion on the flooding problem at that meeting. *The Laredo Times* published a newspaper article on June 11, 1973 reporting the citizen's complaint about the flooding. Thereafter, a local contractor engaged in the development of the subdivision went to the newspaper to complain about the first article because he felt that the article left the misleading impression that flooding existed throughout the subdivision rather than affecting only certain areas. The result of this contact was the allegedly libelous article of June 17, 1973. That second article quoted the contractor at length with regard to the nature of the flooding problem, and his opinions on the possible solutions of that problem. The article contained the following references to Foster:

> "The Rice Development official said the flooded area in question was platted by Jack Foster, who doubles as consultant engineer for Webb County. Foster has been handling numerous engineering jobs for the Commissioners Court on a consultant basis involving road improvements, some paving, park recreational work, and drainage problems in Del Mar Hills."

The statement in the article that Foster platted the flooded area was not correct. He had platted other areas in the subdivision, but not the one where the flooding was occurring.

Foster filed suit claiming that the article was libelous because it placed direct responsibility on him for the flooding and thereby indicated that his work was of poor quality, and also claiming that the article accused him of unethical and illegal conduct by inferring a conflict of interest between his services for the County and his private practice. Petitioner filed a First Amended Answer specifically claiming a privilege under the United States Constitution, and pleading that Foster was either a "public official" or a "public figure," and there was an absence of malice on its part.

The trial court sustained a Motion for Summary Judgment filed by the newspaper. This Judgment was unanimously affirmed by the Texas Court of Civil Appeals, sitting at San Antonio, Texas, which held that: "In our opinion, Foster clearly falls within the most restrictive definition of a 'public official' or 'public figure,' and we hold that he was both a public official and a public figure as those terms are defined by the courts of this State and of the United States." 530 S.W.2d at 616. That Court then found an absence of malice as a matter of law. The Texas Supreme Court, with one original dissent, reversed the lower courts. That Court held that Foster, as elected County Surveyor, was a "public official," but that the malice standard did not apply because the publication contained no express reference to that office and thus did not relate to his fitness for office. It further held that a jury must decide whether the article contained any implied reference. The Court also held that as a paid consultant engineer, Foster was neither a "public official" nor "public figure" under United States Supreme Court opinions. Thus considering the case as involving a libel suit by a private individual, the Court then adopted the negligence standard in Texas and further held that the proof failed to establish that the allegedly libelous

statements were insufficient to warn a reasonably prudent editor of their defamatory potential. Petitioner filed a Motion for Rehearing which was subsequently overruled, but on that occasion one justice was noted as not sitting, while another justice added a second dissenting opinion, joined by the Chief Justice, expressly stating that the rule announced by the majority was contrary to decisions of the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

1.

THE TEXAS SUPREME COURT HAS PLACED AN UNWARRANTED AND UNPRECEDENTED RESTRICTION ON THE FREEDOM OF THE PRESS TO CRITICIZE PUBLIC OFFICIALS, IN DIRECT VIOLATION OF PRIOR RULINGS OF THE UNITED STATES SUPREME COURT.

Although explicitly holding that Respondent Foster was a "public official" for purposes of the rule in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Texas Supreme Court refused to apply the malice standard on the grounds that the newspaper article in question did not clearly relate to Foster's "official conduct." This holding was made despite the express recognition that the United States Supreme Court has interpreted the "official conduct" concept very broadly and has held in *Garrison v. Louisiana*, 379 U.S. 64 (1964) that anything which might touch on an official's fitness for office is relevant and protected by the public official rule. Moreover, the Texas Supreme Court supported its ruling by the proposition that, "... if the

article contained no reference, implied or otherwise, to Foster's position as county surveyor, it could not be said that the article related to his fitness for the office." No authority was cited for this proposition, and the decision below announces a rule for the State of Texas completely contrary to the policy underlying the public official rule. The *New York Times* privilege is designed to encourage uninhibited, robust, and wide open debate on public issues, and that policy is served by any publication relating to the qualifications and performance of a public official, whether or not it refers to his official position.

The only reference below to any precedent for an exception to the *New York Times* rule based on the lack of reference to the person's office is the case of *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971). In that case, the publication referred to a mayor who was also a candidate for county tax assessor. The story used his name, but did not identify him either as a mayor or as a candidate, and the defamatory statement was an alleged indictment arising out of Damron's private activities. The Florida Courts had affirmed a judgement for Damron on precisely the ground invoked by the Texas Supreme Court, namely, that the *New York Times* privilege was inapplicable because the article in question did not refer to Damron's position or candidacy. The United States Supreme Court reversed, holding the *Times* privilege applicable because "a charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is 'always relevant to his fitness for office' for purposes of applying the *New York Times* rule. . . ." 401 U.S. at 300. The Texas Supreme Court attempts in a footnote to distinguish *Ocala Star-Banner* by noting that Damron abandoned his "no reference" theory in the United States Supreme Court, presumably believing that had he

not done so, then such theory would have been accepted as an exception to the *New York Times* rule. Laredo Newspapers, Inc. believes that the United States Supreme Court would not have reversed an otherwise correct judgment of a State Court and which was based upon a valid theory of law simply because a litigant relied on a different theory in the Supreme Court. Instead, Petitioner believes that *Ocala Star-Banner* must be correctly read as a rejection of any attempted "no reference" exception to the *New York Times* rule, and that such rejection would apply whether the publication described past criminal conduct or, as here, non-criminal conduct.

The "no reference" exception to the *New York Times* rule announced by the Texas Supreme Court is a totally unwarranted restriction of freedom of the press in Texas, and should not be allowed to stand. Compounding the error is the holding below that a jury can be allowed to decide as a fact issue whether or not the offending publication is related to the subject's official conduct for purposes of applying the First Amendment privilege. Again, such a holding is totally without precedent, and is contrary to the spirit, if not the letter, of all prior decisions of the United States Supreme Court. The only precedent cited by the Texas Supreme Court for this holding was *Rosenblatt v. Baer*, 383 U.S. 75 (1966). There, the United States Supreme Court held that, "it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'" 388 U.S. at 88. The Texas Supreme Court has apparently interpreted that statement to mean that the trial judge first determines whether the plaintiff is a "public official," but that the jury may decide whether the publication relates to his official conduct and thus, necessarily, whether the malice standard shall apply.

Petitioner suggests that his is a fundamental and dangerous misreading of the *Rosenblatt* opinion. In the very paragraph where the above quote is found, the United States Supreme Court explicitly states that a jury "may" be able to decide if malice exists, but that it is for the trial judge to first make the "public official" determination. The Court elaborated in a footnote explaining that this procedure allows less possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers. In all United States Supreme Court cases on this subject, particularly including the landmark *Gertz v. Welch*, 418 U.S. 323 (1974), the Court has clearly decided whether or not to apply the malice standard as a question of constitutional law without the slightest suggestion that any element of such a determination would ever be submitted to a jury.

2.

THE TEXAS SUPREME COURT SERIOUSLY MISINTERPRETED PRIOR DECISIONS OF THIS COURT BY HOLDING THAT A PROFESSIONAL CONSULTANT PAID BY PUBLIC FUNDS TO ADVISE A GOVERNMENTAL BODY ON A MATTER OF PUBLIC CONCERN WAS NOT AT LEAST A "PUBLIC FIGURE."

The case below was argued and decided largely upon the question of how to interpret the landmark decision in *Gertz v. Welch*, 418 U.S. 323 (1974). It is undisputed that Respondent Foster was regularly hired by the Commissioners Court of Webb County, Texas and paid with public funds to advise and consult that body on a wide variety of engineering problems. It is further

undisputed that he was particularly retained and paid to advise the County Commissioners on how to handle the precise flooding problem which was the subject of the newspaper articles in question. In fact, the record shows that when a particular citizen appeared in the public meeting of the Commissioners Court to complain about the flooding for a second time, the Commissioners immediately summoned Mr. Foster to respond to the complaint in public session because he had already been retained previously to study the problem and give his opinions about a solution. The Texas Supreme Court has nevertheless held under these facts that Foster did not have a special prominence in the resolution of the flooding controversy. That Court stated in support of its conclusion that the record "does not indicate that Foster had any personal interest in the resolution of the flooding problem, and he remained strictly within his role as an adviser to the commissioners court. Consistent with his role as a private consulting engineer employed by the commissioners court, Foster did not attempt to influence the outcome of the flooding controversy through exposure of his personal opinions in the media." The Texas Supreme Court then found support for this analysis in *Gertz v. Welch, supra.*

Petitioner submits that the Texas Supreme Court has fundamentally misread and misunderstood the holding in the *Gertz* case, and has consequently announced a rule in Texas that will have a chilling effect on freedom of the press. The *Gertz* opinion clearly and carefully explained that the designation of a person as a "public figure" may rest on either of two alternative basis, explaining that:

> "In some instances, an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects

himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions." 418 U.S. at 351.

The Texas Supreme Court in its opinion below concentrated exclusively on the fame and notoriety aspect of the *Gertz* test and completely disregarded the fact that Foster was obviously a person drawn into the heart of a public controversy and had definite and obvious influence in the resolution of that controversy. The Texas Court was impressed with the fact that Foster could not personally authorize the expenditure of funds, nor did he supervise other public employees, nor did he have much public contact, but such an analysis leaves a gaping hold in the privilege repeatedly announced by this Court for free and uninhibited discussion of matters involving public figures.

Failure to reverse this decision will have serious adverse effects on the reporting of governmental activities in Texas and in any other State that might choose to follow similar reasoning. It is common knowledge that governmental bodies at all levels have come to rely increasingly on consultants and other independent experts for information and advice in governmental matters. Such persons as rate consultants, architects, consulting engineers, computer experts, public relations advisers, tax consultants, transportation specialists and attorneys are employed by many governments to perform functions that would have been done by full-time governmental personnel in earlier times. These persons are employed to gather information, but also to recommend courses of governmental action. As a practical matter, their role is little different from full-time government officials and employees, except that they are not directly accountable to the public.

It is extremely important for public business which has been "delegated" to private consultants to be monitored by the press as closely as if the work were being done directly by government employees. The present decision, however, cases serious doubts as to the protection of the First Amendment with respect to any newspaper articles relating to work performed for a governmental body by a private consultant.

The comparison made by the Texas Supreme Court to Foster's role as adviser to the County Commissioners Court and the role of Mr. Gertz as a legal adviser to his client is seriously inaccurate. As stated by the *Gertz* opinion, the participation of Gertz "related solely to his representation of a *private* client." 418 U.S. at 352. The entire thrust of all United States Supreme Court opinions in the free speech area clearly establishes that there is an enormous difference between advising a private client and advising a governmental body. This distinction is so fundamental that it has been recognized by legal authorities even apart from constitutional considerations. For example PROSSER ON TORTS, 2d Ed. Chapter 19 §95, and the RESTATEMENT OF TORTS, Chapter 25 §607, have long recognized a privilege of the press to criticize the work of independent contractors paid out of public funds. This reasoning is followed by such cases as *Turley v. W.T.A.X., Inc.*, 236 N.E.2d 778 (Ill. App. 1968). There, the plaintiff was a professional architect and structural engineer suing for defamation against a radio station. The alleged libel related to the plaintiff's services as architect in the design and acquisition of furnishings and equipment for a new city building. Plaintiff was held to be a public official.

The fact that Foster did not hold press conferences or had no personal interest in the resolution of the flooding problem is simply irrelevant. His role in this

controversy was precisely the same as might have been performed by a county attorney had the County Commissioners Court sought legal advice rather than engineering advice. In such a hypotheses, a county attorney would rarely have occasion to issue press releases and would not necessarily have personal feelings about the subject, but it could hardly be said that his rendering of legal advice on a critical public issue would not give him a place of special prominence on the resolution of that issue. Clearly, the malice standard would apply to any alleged defamation of a county attorney. *Henry v. Collins*, 380 U.S. 356 (1965).

The Texas Supreme Court has also erred by construing prior decisions of the United States Supreme Court to mean that the test in a defamation case is not whether a person's position is actually important to the resolution of a public controversy, but instead is whether or not the public has previously manifested an interest in that particular person. This interpretation was apparently derived from a reading of *Rosenblatt v. Baer*, 383 U.S. 75 (1966), but Petitioner urges that this requirement of manifest interest is not suggested by the *Rosenblatt* opinion, nor by the general policy of the *New York Times* privilege, which seeks to encourage discussion of the qualification and performance of all public officials and public figures, not just those in whom the public has previously demonstrated an interest. Under the opinion below, if the public has not previously expressed interest in the activities of a particular public employee, then that employee cannot be a "public official" or "public figure." Thus, unless the opinion is reversed, reports about some government agents in Texas will be privileged only if the public has manifested some degree of independent interest in their activities prior to the time of publication. The press must apparently determine at its peril how much

interest will suffice, and the extent to which such interest must be manifested. The danger of self-censorship which will result from this holding is obvious.

3.

THIS CASE WILL ENABLE THE UNITED STATES SUPREME COURT TO DEFINE THE LIABILITY STANDARD WHICH THE STATES MAY ADOPT IN SUITS INVOLVING A DEFAMATION, THE SUBSTANCE OF WHICH DOES NOT MAKE SUBSTANTIAL DANGER TO REPUTATION APPARENT.

Even if the United States Supreme Court were to agree that Respondent Foster was neither a public official nor a public figure, the facts of this case present an excellent opportunity for this Court to elaborate upon the caveat which was contained in the ultimate holding of *Gertz v. Welch*, 418 U.S. 323 (1974). In *Gertz* this Court held that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher of a defamatory falsehood injurious to a private individual. The Court cautioned, however, that the holding applied to a case where the substance of the defamatory statement makes substantial danger to reputation apparent, and that different considerations would be involved if a State conditioned civil liability on a factual misstatement whose content did not warn a reasonably prudent editor of its defamatory potential. The Texas Supreme Court has now specifically adopted this standard, but in Footnote 15 of its opinion simply states that the present record fails to establish that the

allegedly libelous statements were insufficient to warn a reasonably prudent editor of their defamatory potential.

In its Motion for Rehearing below, Petitioner urged the Court to explain that comment, as it is not clear whether the Texas Court was holding, (1) that the substantial danger to reputation was apparent from the statements in question, or (2) that perhaps a jury should make such a determination, or (3) that the Court did not have enough information to make such a determination. Petitioner suggests that any of the three alternatives are erroneous. The present record contains the entire newspaper article plus a complete record as to how and why the article was prepared. Certainly, a constitutional standard should not be decided by a jury. Finally, there is absolutely nothing about the allegedly defamatory statement that would warn a publisher that the statements would be substantially dangerous to anyone's reputation. The *Gertz* holding referred to the case of *Time, Inc. v. Hill*, 385 U.S. 374 (1967), in which this Court held that the negligence standard would not suffice when a complaint simply refers to erroneous facts associated in a news article with a person's name, picture, or portrait, and which are nondefamatory on their face. Petitioner suggests that it would be difficult to imagine a statement more innocuous on its face than that involved in this case, and yet still be allegedly libelous. Petitioner further suggests that it would be helpful to the news media everywhere if the United States Supreme Court would now explain what standard of liability is permissible in a case of this kind.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Texas.

Respectfully submitted,

GEORGE P. KAZEN
Mann, Castillon, Freed & Kazen
Post Office Box 820
Laredo, Texas 78040
(512) 723-5581

Attorneys for Petitioner

APPENDIX A

Sunday, June 17, 1973 The Laredo Times

DEVELOPER SAYS FLOODING IN DEL MAR CONFINED TO ONE AREA

By Odie Arambula
Times City Editor

Flooding conditions resulting from poor storm sewer drainage is confined to a given spot of Del Mar Hills and not the entire subdivision, according to a spokesman for a developer.

Earl Rice of James Rice Construction Co. told The Times that general reference to Del Mar Hills in reports of recent flooding "is not fair because we don't have that problem with our development."

RICE SAID the complaints of May 1972 and this week by a Del Mar resident, Glen Anderson, involved flooding of some homes in an area developed years ago by Harlingen interests.

The Rice development official said the flooded area in question was platted by Jack Foster, who doubles as consultant engineer for Webb County.

Foster has been handling numerous engineering jobs for the Commissioners Court on a consultant basis involving road improvements, some paving, park recreational work and drainage problems in Del Mar Hills.

RICE SAID the construction firm spent some $27,000 for storm drainage facilities in one development and $36,000 for similar work in another area of Del Mar Hills.

He mentioned development in a 44-acre tract and having completed 92 homes.

"We've never had any flooding or drainage problems," Rice said.

He said James Rice Construction Co. has been working in the subdivision since 1969.

Rice said he sympathizes with the difficulties of owners on Amherst where apparently clogged storm sewer drains caused flooding in a property cluster, including the Anderson home.

RICE SAID in this instance he feels the county has responsibility of maintaining storm sewer systems as streets in the subdivision. He added that the county is collecting taxes from some 500 Del Mar property owners.

"The Del Mar Conservation District is not set up to do anything about the problem," Rice said. "The Del Mar Betterment League is just a group of property owners. The district is in the business to provide water and sewer services. That's their job."

The contractor's representative said further development in Del Mar Hills has nothing to do with the flooding problems brought before the county commissioners.

ANDERSON TOLD commissioners he bought a home at 5 Broadcrest in 1963 and didn't experience flooding problems until May 1972 and last Sunday after rainstorms.

Rice, meanwhile, said the problem at Amherst was created years ago.

"In our development, we don't have the problem and we don't feel we should be held responsible," Rice said. "The district is not claiming liability. Who did the engineering? The county should do whatever is necessary to eliminate the problem."

Rice said he has discussed the problem with Foster and County Atty. John Fitzgibbon. Fitzgibbon is the attorney for the Rice firm.

APPENDIX B

IN THE SUPREME COURT OF TEXAS

No. B-5747

JOHN E. FOSTER,

Petitioner,

v.

LAREDO NEWSPAPERS, INC.,

Respondent.

FROM WEBB COUNTY, FOURTH DISTRICT

This libel action instituted by John Foster against Laredo Newspapers, Inc. affords this court an opportunity to interpret recent rulings of the United States Supreme Court that establish differing standards of care applicable to various classes of defamation plaintiffs. The trial court rendered a take-nothing summary judgment in favor of the defendant Newspaper and the court of civil appeals affirmed. 530 S.W.2d 611. We reverse and remand the case for trial.

The plaintiff Foster is a licensed civil engineer engaged in private engineering practice in Laredo, Texas. Additionally, Foster is the duly elected county surveyor of Webb County. He also has been regularly hired by the County as a private consulting engineer to perform specific projects. One such private consulting project involved the investigation by Foster of a flooding problem in a subdivision known as Del Mar

Hills. On June 17, 1973 an article printed in the Laredo Times newspaper in connection with the flooding problem made the following references to Foster:

> "The Rice development official said the flooded area in question was platted by Jack Foster, who doubles as a consultant engineer for Webb County.
>
> "Foster has been handling numerous engineering jobs for the Commissioners Court on a consultant basis involving road improvements, some paving, park recreational work and drainage problems in Del Mar Hills."

The article resulted from a recent flooding incident and an appearance before the commissioner's court of Webb County by a resident of Del Mar Hills complaining of the flooding problem in his subdivision. Following the meeting of the commissioner's court an initial article appeared in the Laredo Times covering the court hearing on the flooding problem. One week later that Newspaper published a follow-up article on the flooding problem, and it was this second article which contained the allegedly libelous statements upon which this action is based. The second article was prompted by a contractor engaged in development of the subdivision who complained to the Newspaper that the first article left a misleading impression that the flooding problem existed throughout Del Mar Hills. The article quoted the contractor's statements at length with regard to the nature of the flooding and his opinion that the County should solve the flooding problem. The statement in the article that Foster platted the flood area was false.

Foster filed this action against Laredo Newspapers, Inc. alleging that the article was libelous because (1) it attributed to him "direct responsibility for the severe flooding of homes located in said Del Mar Hills, thereby indicating that [Foster's] work was of inferior and unsatisfactory quality," and (2) the phrase "who

doubles as consultant engineer for Webb County" used in the article indicated that Foster "was performing services for the County of Webb and other parties when a direct conflict of interest between the said County and other said parties existed, and that therefore [Foster] was guilty of unethical and illegal conduct." Foster sought $250,000 as damages for the allegedly libelous statements and an additional $125,000 punitive damages.

The Newspaper filed a motion for summary judgment on the grounds that Foster is either a "public official" or "public figure" as defined by the Supreme Court of the United States in the line of decisions beginning with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and consequently there could be no liability without a showing of "actual malice." The Newspaper further contended that the undisputed evidence in the record negated a finding of "actual malice."

The trial court sustained the Newspaper's motion for summary judgment and the court of civil appeals affirmed holding that "Foster clearly falls within the most restrictive definition of a 'public official' or a 'public figure,' and we hold that he was both a public official and a public figure as those terms are defined by the courts of this state and of the United States." 530 S.W.2d 611 at 616. The court further held that the summary judgment proof "establishes as a matter of law that such publication was not made with malice as that term is defined in the applicable state and federal court decisions." 530 S.W.2d 611 at 619.

Foster's principal points of error attack the holding of the court of civil appeals (1) that he was either a "public official" or "public figure," and (2) that the summary judgment proof negated the existence of a fact issue with respect to the question of malice. The initial and crucial question is whether the court of civil

appeals correctly classified Foster as a "public official" or "public figure."

I. PUBLIC OFFICIAL

In *New York Times Co. v. Sullivan, supra*, the Supreme Court of the United States, for the first time, considered the extent to which the constitutional protections for speech and press limit recovery in a libel action brought by a public official against critics of his official conduct. The plaintiff, an elected city commissioner whose duties included supervision of the city's police department, brought suit in a state court alleging that he had been libeled by an advertisement printed in the New York Times newspaper. The advertisement included statements, some of which were false, about action by the city police directed against students who participated in a civil rights demonstration and against a leader of the civil rights movement. Following a jury verdict for the plaintiff and affirmance by the state supreme court, the case was reviewed by the Supreme Court of the United States which reversed and remanded holding that the constitutional guarantees of the First and Fourteenth Amendments require "*a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.*"[1] [Emphasis added.] 376 U.S. 254 at 279-80. In so holding the Court recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust,

[1] Hereinafter referred to as the *New York Times* rule.

and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. 254 at 270. The Court further reasoned that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.' " 376 U.S. 254 at 279.

In *New York Times* the Court did not attempt to define the "public official" and "official conduct" concepts, but left determination of the scope of these concepts for future cases.[2] Further explanation of the "public official" concept was then provided by the United States Supreme Court in *Rosenblatt v. Baer*, 383 U.S. 75 (1966). The plaintiff in *Rosenblatt* was not an *elected* official but, rather, a former supervisor of a county recreation area who was employed by and directly responsible to the county commissioners. His libel action was brought against a local newspaper for publication of a column that allegedly criticized the financial management of the recreation area while it was under the plaintiff's supervision. In deciding whether to classify the plaintiff as a public official, the Court set forth the competing values that must be weighed and formulated a broad definition of the "public official" concept. First, the Court emphasized that there is a strong interest in debate on public issues and about persons who are in a position to influence the resolution of those issues.

[2] The Court stated: "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. . . . Nor need we here determine the boundaries of the 'official conduct' concept." 376 U.S. 254 at 283 n. 22.

> "Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." 383 U.S. 75 at 85.

Secondly, the Court recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." In balancing society's interest in protecting the reputations of its citizens and the constitutional values of free speech and press, the Court unmistakably concluded that the "public official" designation does not apply to *all* government employees.[3] Rather, the designation applies "[*w*]*here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees.*" [Emphasis added.] 383 U.S. 75 at 86.

In determining whether Foster was a "public official" for purposes of the *New York Times* rule, two aspects of Foster's relationship with the county government must be examined. Foster was, first, a private consulting engineer who was from time to time employed by the County and, second, he was the duly elected county surveyor.

The Newspaper contends that the *New York Times* rule is applicable because Foster was a "public official" in his capacity as a private consulting engineer employed by the County. The summary judgment proof shows that Foster was employed by the County as a private consulting engineer for numerous projects and, according to the county judge, Foster performed the

[3] In *Rosenblatt* the Court left open the possibility that on remand the plaintiff could adduce proofs that he was not a "public official."

large majority of the County's engineering jobs. Nevertheless, Foster had no permanent engineering position with the County and it was undisputed that the County also hired other consulting engineers. Therefore, Foster must be treated as a temporary employee of the County and the applicability of the *New York Times* rule must be determined with reference to the particular engineering project discussed in the allegedly libelous article.[4]

Foster's involvement with the flooding problems in Del Mar Hills as a consulting engineer for the County dated back to April 1971 when he was employed by the commissioner's court to conduct an inspection of the newly constructed streets and storm drainage system in Del Mar Hills. Subsequently, in May and June 1972 when residents of the subdivision complained to the commissioner's court about recent flooding of their homes, Foster was employed to study the drainage problem and determine the availability of a federal grant to remedy the flooding problem. Finally, in June 1973 when a resident of Del Mar Hills again complained to the Commissioner's court about the recent flooding of his home, the court summoned Foster to appear

[4] Foster's status as a temporary employee of the County is supported by two additional considerations: (1) it appears that Foster's duties and responsibilities as a county employee varied considerably from one project to another; and (2) if there was any public interest in Foster's employment with the County it would naturally tend to focus on Foster's involvement in each particular engineering project.

before the court and advise it about the drainage problem.[5]

We HOLD that the summary judgment proof failed to establish that Foster's position as a consulting engineer possessed "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Rosenblatt v. Baer, supra*, at 86. The summary judgment proof showed that whatever public interest the flooding aroused was focused primarily on the commissioner's court which was attempting to determine the County's responsibility for the flooding problem. Although Foster occasionally reported his findings to the commissioner's court at public meetings, the record fails to show that the presentation of his reports stirred up any significant public interest. The apparent lack of public interest in Foster's activities was undoubtedly attributable to the fact that Foster had little if any authority to exercise on behalf of the County. The commissioner's court assigned Foster specific tasks, such as conducting a drainage study and determining the availability of a federal grant to solve the flooding problem, but the nature of these tasks, as described in the summary judgment proof, did not require that Foster

[5] It appears that Foster was not employed by the County on the date that the allegedly libelous newspaper article was printed. In *Rosenblatt v. Baer, supra*, the Court recognized that "there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the *New York Times* rule." 383 U.S. 75 at 87 n. 14. We deem it evident that Foster was not so far removed from his former position as a consulting engineer for the County with regard to the flooding problem as to render the *New York Times* rule inapplicable.

exercise a significant amount of discretion. Furthermore, it does not appear that Foster could personally authorize the expenditure of public funds to solve the flooding problem, nor did he supervise any other employees of the County. Another fact that probably explains the lack of public interest in Foster's activities was that Foster had very little public contact. There was apparently no public input with regard to Foster's employment by the commissioner's court to study the flooding problem. In addition, the tasks assigned to Foster did not require that he act in a representative capacity for the County or have any direct dealings with the public.

The Newspaper also urges that Foster was a "public official" under the *New York Times* rule in his capacity as elected county surveyor and that the allegedly libelous statements in the newspaper article were relevant to his fitness for that elected position. On the other hand, Foster points to the summary judgment proof which indicates that the office of county surveyor entails minimal responsibilities and has become virtually obsolete in recent years. According to Foster, he occupied the office as a matter of convenience to the County because the County was required by statute to elect a surveyor.[6] Furthermore, Foster was paid no salary as county surveyor, and he had no staff provided by the County. During the seven and one-half years that he held the position Foster made an occasional patent survey for the County, but he performed no other duties in his official capacity.

Although the summary judgment proof certainly established that Foster was a member of the lower echelons of the County government, we note that the United States Supreme Court has not reserved the

[6] TEX. REV. CIV. STAT. ANN. art. 5283.

"public official" designation for high-level public officers alone. *Time v. Pape*, 401 U.S. 279 (1971) (deputy chief of detectives); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (deputy sheriff); *Beckley Newspapers v. Hanks*, 389 U.S. 81 (1967) (elected clerk of county criminal and circuit courts); *Henry v. Collins*, 380 U.S. 356 (1965) (county attorney). More important, the definition of "public official" in *Rosenblatt v. Baer, supra*, is keyed to the *apparent* importance of the official position and the *public interest* in such position. It may be presumed that a certain amount of public interest exists with regard to any governmental position if the general public selects the person who holds the position through the election process. In recognition of the special public interest in elected officials, the Supreme Court has held that the constitutional guarantees of free speech and press have their "fullest and most urgent application" to the election process. *Patriot Co. v. Roy*, 401 U.S. 265 (1971). Finally, it cannot be doubted that the *New York Times* rule applies to any *candidate* for public office, even a candidate for a position such as county surveyor, at least during the course of the election campaign. It would be somewhat incongruous to hold that a candidate for public office is a public person during the campaign but loses that status upon taking office. We therefore conclude that Foster was a "public official" for purposes of the *New York Times* rule.

We hold, however, that the summary judgment evidence failed to establish the applicability of the *New York Times* rule because the allegedly libelous statements in the newspaper article did not clearly relate to Foster's "official conduct" as county surveyor. It is undoubtedly true that the United States Supreme Court has interpreted the "official conduct" concept very

broadly,[7] but all of the public official defamation cases considered by the Court, except one,[8] involved statements that referred to performance of official duties or fitness for office of government officials. In the instant case, however, the newspaper article containing the allegedly libelous statements made no express reference to Foster's fitness for the office of county surveyor, nor was it concerned with Foster's performance of his official duties. Instead, the article discussed Foster's activities as "consultant engineer for Webb County."

Nevertheless, the Newspaper seeks to invoke the *New York Times* rule on the grounds that the allegedly

[7] In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court stated: "The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant." 379 U.S. 64 at 77. Also, in *Patriot Co. v. Roy, supra*, the Court suggested that the "official conduct" concept has been substantially diluted: "Indeed, whatever vitality the 'offical conduct' concept may retain with regard to occupants of public office, cf. Garrison, supra, at 72 n. 8, 13 L. Ed 2d at 131, it is clearly of little applicability in the context of an election campaign." 401 U.S. 265 at 274.

[8] In *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971), the plaintiff, who was a mayor and candidate for county tax assessor, filed a libel action against a local newspaper as a result of an article which mistakenly stated that he had been indicted on perjury charges in a federal court. The article referred to the plaintiff as "local garage owner Leonard Damron" but did not mention that Damron was a mayor or a candidate for county tax assessor. The Court held that the *New York Times* rule was applicable but noted: "Both the trial judge on motion for new trial and the District Court of Appeal rested their conclusion that New York Times did not apply partly on the ground that the defamatory article nowhere mentioned the respondent's status as mayor of Crystal River or as a candidate for county tax assessor. The respondent has not pursued that theory here." 401 U.S. 295 at 300 n. 4.

libelous statements in the article were germane to Foster's fitness for the office of county surveyor. However, if the article contained no reference, implied or otherwise, to Foster's position as county surveyor, it could not be said that the article related to his fitness for the office. If such is the instance, the allegedly libelous statements did not concern Foster's "official conduct" and the *New York Times* rule would not be applicable. The "public official" rule set forth in the *New York Times* case was not meant to protect reporting of matters that have at best a coincidental bearing on governmental affairs. Of course, there may be instances where the absence of an express reference to an individual's official capacity is unimportant. Many public officials are so well-known in their communities that the general public automatically associates them with their official positions. In such instances an express reference in a newspaper article to the individual's official capacity is unnecessary and the reference is implied. Based upon the summary judgment evidence presented we cannot conclude that the article in question contained any implied reference to Foster's position as county surveyor.[9] In particular, Foster has shown that the duties and responsibilities of the county surveyor were minimal and that he was not opposed in any election for the position.

---

[9]The deposition testimony of the Newspaper's city editor who wrote the article in question indicates that he did not associate the statements in the article with Foster's qualifications for the office of county surveyor. According to the city editor, the sole purpose of the reference to Foster was to show that the County was aware of the flooding problem through Foster's activities as a consulting engineer. The city editor made the following response to a question by plaintiff's counsel:

> "Q. In making the statement in the only daily newspaper published in this area that Mr. Jack Foster, whom you know to be a professional engineer, had so platted an area

(continued)

Thus, a fact issue was raised as to whether the allegedly libelous statements in the newspaper article referred to Foster's position as county surveyor. In order to establish the applicability of the *New York Times* rule the Newspaper must at least prove upon the trial of this case that the article impliedly referred thereto.[10]

II. PUBLIC FIGURE

The *New York Times* rule, which previously had been restricted in application to "public officials," was extended to cover "public figures" in *Curtis Publishing Company v. Butts*, and its companion case, *Associated Press v. Walker*, 388 U.S. 130 (1967). *Butts* involved publication of an article charging a well-known athletic director of a major university with having "fixed" a

---

(footnote continued from preceding page)

> that it was subject to severe flooding, didn't you realize, Mr. Arambula, that this would hurt his reputation and that it would mark his work as being inferior and unsatisfactory?
>
> "A. I would answer that negative, sir. The conservation here had nothing to do with Jack Foster. He [Mr. Rice, the contractor who was being interviewed] injected Jack into the conversation when this matter of the County being responsible and who should look out there and see what's wrong and who should take action to provide a remedy for these people because as I recall in the conversation I asked Mr. Rice—I suggested to him that he should pose this problem to the Commissioner's Court and again here he said, 'well, you know, they know about these problems, they're aware. . . .'"

[10]Although it is the task of the trial judge in the first instance to determine the existence of the privilege under the *New York Times* rule, *Rosenblatt v. Baer, supra*, at 88, the trial court may submit to the jury fact issues relating to the existence of the privilege.

football game. Although the plaintiff was the university's athletic director at the time the article was published, he was employed by a private corporation and not by the state itself. In *Walker* the allegedly libelous article charged the plaintiff with encouraging and leading rioters on a university campus in connection with a racial controversy. The Court stated that the plaintiff, who was a retired army general, "could fairly be deemed a man of some political prominence." Although the Court could not agree upon an opinion in *Butts* and its companion, *Walker*, a majority of the Court held that the plaintiffs in both cases were "public figures," and further held, through Mr. Chief Justice Warren's concurring opinion, that the *New York Times* rule applies to "public figures" as well as "public officials." Mr. Chief Justice Warren wrote:

> "... it is plain that although they are not subject to the restraints of the political process, 'public figures,' like 'public officials,' often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media communication, both to influence policy and to counter criticism of their views and activities." 388 U.S. 130 at 164.

Further elaboration of the public figure concept was provided by the Court in *Gertz v. Welch*, 418 U.S. 323 (1974). The plaintiff in *Gertz* was an attorney representing a murder victim's family in a civil suit against a police officer who was convicted for the murder. The basis for the libel suit was a magazine article in connection with the murder incident which falsely (1) implied that the plaintiff had a criminal record, (2) charged that the plaintiff was a "Leninist" or a "Communist-fronter," and (3) identified the plaintiff as a former official of a Marxist organization. In determining whether *Gertz* possessed the necessary character-

istics of a "public figure," the Court observed that "public figures" fall into two general categories:

> "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. *In either case such persons assume special prominence in the resolution of public questions.*" [Emphasis added.] 418 U.S. 323 at 351.

The Court first concluded that the plaintiff did not fit within the category of individuals who are "public figures" for all purposes and in all contexts. The Court then turned to the question whether the plaintiff was a public figure with respect to the particular controversy giving rise to the defamation, and concluded:

> "In this context it is plain that petitioner was not a public figure.... *He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.*" [Emphasis added.] 418 U.S. 323 at 352.

There is nothing in the summary judgment evidence to indicate that Foster achieved pervasive fame or notoriety in the community. It appears that Foster certainly did not possess any greater fame or notoriety in his community than the plaintiff in *Gertz* who "served as an officer of local civic groups and of various professional organizations, and ... published several books and articles on legal subjects." 418 U.S. 323 at 351. We therefore hold, as did the Court in *Gertz*, that Foster did not achieve the status of "a public figure for all purposes and in all contexts."

With regard to Foster's status as a "public figure" within the context of the controversy over the flooding problem, our previous discussion of his role as a consulting engineer made clear that Foster did not assume a special prominence in the resolution of this controversy. Foster is clearly distinguishable from the plaintiff in *Walker* who, according to the Court, made a number of strong public statements related to federal intervention in racial matters and obtained wide publicity of his views. In addition, there is little resemblance between Foster and the plaintiff in *Butts* who was described by the Court as "a well-known and respected figure in coaching ranks" who may have attained "public figure" status by virtue of his position alone.

The summary judgment record does not indicate that Foster had any personal interest in the resolution of the flooding problem, and he remained strictly within his role as an adviser to the commissioner's court.[11] Consistent with his role as a private consulting engineer employed by the commissioner's court, Foster did not attempt to influence the outcome of the flooding

[11] A quite different situation was presented in *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6 (1970), where it was conceded that the plaintiff was a public figure in the community. The Court stated that "[t]his concession was clearly correct," emphasizing the following factors: "Bresler was deeply involved in the future development of the city of Greenbelt. He had entered into agreements with the city for zoning variances in the past, and was again seeking such favors to permit the construction of housing units of a type not contemplated in the original city plan. At the same time the city was trying to obtain a tract of land owned by Bresler for the purpose of building a school. Negotiations of significant public concern were in progress, both with school officials and the city council. Bresler's status thus clearly fell within even the most restrictive definition of a 'public figure.' " 398 U.S. 6 at 9-10.

controversy through exposure of his personal opinions in the media. Similar considerations influenced the United States Supreme Court to hold that the plaintiff in *Gertz* was not a "public figure" within the context of that particular controversy:

> "He [the plaintiff] played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so." 418 U.S. 323 at 352.

In view of Foster's limited participation in the controversy giving rise to the allegedly libelous newspaper article, we consider it evident that he "did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." 418 U.S. 323 at 352. We therefore hold that the summary judgment evidence failed to establish that Foster achieved the status of a public figure within the context of the local controversy over the flooding in Del Mar Hills.

III. STANDARD OF CARE

Having held that the summary judgment proof failed to establish that Foster was a "public figure" or that the allegedly libelous statements related to his official conduct, we must now determine whether Foster's right of recovery against the Newspaper as a private individual[12] nevertheless depends upon the *New York*

[12] We use the term "private individual" as encompassing "public officials" whose official conduct is not the subject of the allegedly libelous statement.

Times standard–knowledge of falsity or reckless disregard for the truth. The question whether the *New York Times* standard applies to private individuals such as Foster was first considered by the Supreme Court in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971). Although the majority of the Court could not agree upon an opinion in *Rosenbloom* Mr. Justice Brennan's plurality opinion did conclude that the *New York Times* standard applies in a libel action by a private individual against a licensed radio station for a defamatory falsehood relating to a matter of public or general concern.

Subsequently, in *Gertz v. Welch, supra*, a majority of the Court rejected the approach of the plurality opinion in *Rosenbloom* and held that states may define for themselves the appropriate standard of liability for a publisher or broadcaster of a defamatory falsehood injurous to a private individual "so long as they do not impose liability without fault." 418 U.S. 323 at 347. The Court reasoned that "[t]his approach provides a more equitable boundary between the competing concerns involved," and "recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." 418 U.S. 323 at 347-48. The effect of the Court's holding that states may not impose liability without fault on publishers and broadcasters of defamatory falsehoods is to sanction a simple negligence standard as complying with the minimum

requirements of the First and Fourteenth Amendments.[13]

As a further limitation upon the right of private individuals to recover in libel actions against publishers or broadcasters of defamatory falsehoods, the Court held in *Gertz* that a private individual "who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury." 418 U.S. 323 at 350. In so holding, the Court explained that the states' interest in protecting the reputation of its citizens becomes more attenuated in the field of presumed and punitive damages, and the discretion of juries to award substantial sums as punitive damages poses a serious threat to the constitutional values of free speech and press.

The limitations imposed in *Gertz* upon the states' right to secure compensation for injuries to reputation represent a minimum standard which the states are constitutionally bound to adopt. However, states retain the right to provide additional safeguards for the constitutional guarantees of free speech and press. Since *Gertz* was decided, two states have extended the *New York Times* standard to cover private individuals involved in matters of public concern. *Walker v. Colorado Springs Sun, Inc.*, Colo., 538 P.2d 450 (1975), *cert.*

---

[13]Mr. Justice Blackmun's concurring opinion in *Gertz v. Welch, supra*, stated that "the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard." 418 U.S. 323 at 353. Also, Mr. Justice Powell's concurring opinion in *Time, Inc. v. Firestone*, ____ U.S. ____, 96 S. Ct. 958, 970 (1976), clearly implied that proof of simple negligence satisfies the minimal constitutional requirements: "Thus, while a State may elect to hold a publisher to a lesser duty of care, there is no First Amendment constraint against allowing recovery upon proof of negligence."

denied, ____ U.S. ____ (1976) (adopting a slightly modified version of the *New York Times* standard); *Aafco Heating & Air Con. Co. v. Northwest Pub., Inc.*, 321 N.E.2d 580 (Ind. App. 1974), *cert. denied*, 96 U.S. 1112 (1976). With respect to defamatory falsehoods about private individuals and relating to matters of legitimate public concern New York has adopted a "grossly irresponsible conduct" standard of liability. *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569 (1975). However, the majority of courts in other jurisdictions where the question has been decided have adopted negligence as the standard of liability in defamation actions by all private individuals. *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co.*, 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); *Cahill v. Hawaiian Paradise Park Corporation*, 543 P.2d 1356 (Hawaii 1975); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); *Gobin v. Globe Publishing Company*, 216 Kan. 223, 531 P.2d 76 (1975); *Jacron Sales Co., Inc. v. Sindorf*, 350 A.2d 688 (Md. 1976); *Stone v. Essex County Newspapers, Inc.*, Mass., 330 N.E.2d 161 (1975); *Taskett v. King Broadcasting Company*, Wash., 546 P.2d 81 (1976).

The shortcomings of the *New York Times* standard are widely recognized. In order to recover in a defamation action under the *New York Times* standard a plaintiff must produce "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson, supra*, at 731. The Supreme Court has noted the deficiencies of this strict standard:

> "It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." 390 U.S. 727 at 731.

The *New York Times* standard, of course, relates only to "public officials" and "public figures." Private individuals, on the other hand, whether engaged in matters of public concern or not, involve quite different considerations. The First Amendment interest in vigorous reporting of the activities of "public officials" is clearly more compelling than the interest in reporting activities of private individuals because "[c]riticism of government is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer, supra*, at 85. Furthermore, application of the *New York Times* standard to "public figures" may be justified on the grounds that the state has a less substantial interest in protecting persons who have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods.[14] In contrast, private individuals are more deserving of protection because, as a class, they are less likely to seek public attention and comment. We therefore decline to extend the *New York Times* standard to actions by private individuals seeking to recover compensation for actual injuries.

We also decline to adopt an intermediate standard of liability such as gross negligence because it would not provide demonstrably greater protection to the media from self-censorship than a standard of ordinary negligence. The distinction between ordinary negligence and gross negligence in the defamation context is not entirely clear, and it is doubtful that the choice of one label rather than the other will significantly affect the

---

[14] "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Gertz v. Welch, supra*, at 345.

evolution of constitutional defamation law. Limitations upon the right of recovery in defamation actions that are deemed necessary to protect publishers and broadcasters from an unreasonable degree of liability will undoubtedly be adopted by the courts regardless which label is used.

We hold that a private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false. In addition, the liability of a publisher or broadcaster of a defamatory falsehood about a private individual may not be predicated upon "a factual misstatement whose content [would] not warn a reasonably prudent editor or broadcaster of its defamatory potential." *Gertz v. Welch, supra*, at 348.[15]

The negligence standard of liability coupled with the "actual injury" requirement established in *Gertz* provides a useful beginning point for the development of

[15]The Court added the following caveat in *Gertz*: "Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." 418 U.S. 323 at 348. We interpret the caveat to mean that *no* liability may be predicated upon a statement whose content would not warn a reasonably prudent editor or broadcaster of its defamatory potential. *See* RESTATEMENT (Second) OF TORTS, §5808, comment c at 28-9 (Tent. Draft No. 21, 1975). An editor or broadcaster who has taken reasonable precautions to assure that his statements will not be injurious to reputation is no less deserving of protection from libel actions than one who had made a reasonable inquiry to determine the truth of his statements. With respect to the instant case, the summary judgment proof fails to establish that the allegedly libelous statements were insufficient to warn a reasonably prudent editor or broadcaster of their defamatory potential.

constitutional defamation law and has the capability of achieving a fair balance between the competing interests at stake. In light of our adoption of a negligence standard in defamation actions instituted by private individuals such as Foster, the summary judgment rendered in favor of the Newspaper must be reversed. The Newspaper's motion for summary judgment sought to establish the applicability of the *New York Times* standard to Foster as a "public official" or "public figure" and then to negate the existence of any fact issue with respect to the *New York Times* standard. The Newspaper has not asserted a right to summary judgment upon a negligence standard. We therefore find it unnecessary to determine whether the summary judgment proof negated the existence of any fact issues with regard to negligence or to further elaborate upon the negligence standard adopted today.

The judgments of the trial court and of the court of civil appeals are reversed and the cause is remanded for trial.

SAM D. JOHNSON
Justice

Dissenting opinion by Justice Pope.

OPINION DELIVERED: July 14, 1976.

APPENDIX C

IN THE SUPREME COURT OF TEXAS

No. B-5747

JOHN E. FOSTER,

Petitioner,

v.

LAREDO NEWSPAPERS, INC.

Respondent.

FROM WEBB COUNTY, FOURTH DISTRICT

DISSENTING OPINION

I respectfully dissent. John Foster was a public official when the article in question was published and actual malice was an essential element of the libel action. I cannot improve upon these reasons which are expressed by the opinion in the court of civil appeals:

> It is undisputed from the record that (a) Foster is the public surveyor of Webb County, (b) such office is an elective office provided for under the laws of this state, (c) Foster's name has appeared on the public ballot in Webb County on numerous occasions, and he has been elected to such office by the voters of Webb County on numerous occasions, (d) at the time of the alleged libel and for many years before, Foster was the county surveyor of Webb County.

It is also undisputed that Foster, over a period of years, had been employed by Webb County as the consultant engineer on various public projects, including construction of county swimming pools, development of recreational areas, drainage problems in the Del Mar Hills Subdivision, road improvements, jail house improvements, design on a children's park, and work at a county dam. There is testimony that these projects covered the vast majority of all the major county projects during the last ten years and that Foster was hired by Webb County for these projects and was paid out of public funds for such work.

It is also clear that Foster had taken an active part in the particular activities giving rise to the defamation. The newspaper article in which the alleged libelous statement was made involved the problem of flooding in the Del Mar Hills Subdivision, which was a matter of considerable public interest in Laredo and in Webb County, and had resulted in citizen's complaints and public meetings in Laredo. Such flooding problems had been the subject of a previous article in the Laredo Times which covered a public meeting of the Commissioner's Court on June 11, 1973, at which time, a private citizen, Mr. Anderson, a resident of the Del Mar Hills Subdivision had complained about the flooding problem. This same citizen had previously complained to the Commissioner's Court in 1972 about such floods and, as a result of such complaint, Foster was called in by the Commissioner's Court to investigate and make a study of the drainage problem. Such study was made by Foster and he reported to the Commissioner's Court in this regard. Foster was paid for such services by Webb County. When Anderson returned to the Commissioner's Court a second time in June, 1973, Foster was again called by the Commissioner's Court because of his familiarity

with the problem and participated in the public meeting.

It would appear that Foster was not only involved in the particular controversy giving rise to the suit here involved but that his participation and involvement was connected with and arose out of his official duties and services for Webb County, either as a public official of Webb County or as a paid consultant engineer for such county.

In our opinion, Foster clearly falls within the most restrictive definition of a "public official" or a "public figure," and we hold that he was both a public official and a public figure as those terms are defined by the courts of this state and of the United States. 530 S.W.2d 611, 615-616.

JACK POPE
Justice

OPINION DELIVERED:
July 14, 1976.

APPENDIX D

IN THE SUPREME COURT OF TEXAS

No. B-5747

JOHN E. FOSTER,

Petitioner,

v.

LAREDO NEWSPAPERS, INC.,

Respondent.

FROM WEBB COUNTY, FOURTH DISTRICT

ON MOTION FOR REHEARING
DISSENTING OPINION

I would affirm the judgment of the lower courts. The Constitution of Texas provides that the Legislature shall "prescribe the duties and provide for the election" of a County Surveyor "who shall have an office at the county seat. . . ." Article 16, Section 44. Plaintiff is a public official as the elected County Surveyor of Webb County and the newspaper article, to the extent that it could be said to be defamatory, bears upon the plaintiff's fitness for that office. I find no basis for our holding that the newspaper article itself must give notice of the office or performance of official duties of the plaintiff. Can it be the law that the *Sullivan* rule applies to the publication of a news article about an officeholder whose identity and office is not familiar to the general public–if, but only if, the article itself

reveals that the defamed person is an elected official? I regard this rule as contrary to the decisions of the United States Supreme Court.

THOMAS M. REAVLEY
Justice

Chief Justice Greenhil joins in this dissenting opinion.

OPINION DELIVERED: October 6, 1976.

Supreme Court, U. S.
FILED
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-926

LAREDO NEWSPAPERS, INC.,
Petitioner

VS

JOHN E. FOSTER,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION AND RESPONDENT'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

J. G. Hornberger
J. G. Hornberger, Jr.
915 Victoria Street
Laredo, Texas 78040
(512) 72 2-1121
Attorneys for Respondent

TABLE OF CONTENTS

	Page
LIST OF AUTHORITIES	i
STATEMENT OF THE CASE	1
RESPONDENT'S REPLY TO:	
OPINION BELOW	3
JURISDICTION	3
QUESTIONS PRESENTED	3
THE HOLDINGS OF THE SUPREME COURT OF TEXAS	7
RESPONDENT'S REPLY TO PETITIONER'S FIRST REASON FOR GRANTING THE WRIT	12
RESPONDENT'S REPLY TO PETITIONER'S SECOND REASON FOR GRANTING THE WRIT	28
RESPONDENT'S REPLY TO PETITIONER'S THIRD REASON FOR GRANTING THE WRIT	33
SUMMARY OF ARGUMENT	38
CONCLUSION	38
RESPONDENT'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS	39
QUESTION PRESENTED	39
STATEMENT	40
REASONS FOR GRANTING THE WRIT	43
CONCLUSION	47
CERTIFICATE OF SERVICE	47
APPENDIX A	1a-10a
APPENDIX B	1b-23b

LIST OF AUTHORITIES

	Page
Alabama Code, Tit. 7, Secs. 908-907	24
Amant v Thompson, 390 U.S. 727 (1968)	41
Article 5282a, Revised Civil Statutes of Texas	20
Article 5283, Revised Civil Statutes of Texas	20
Article 5287, Revised Civil Statutes of Texas	20
Article 5288 thru 5298, Revised Civil Statutes of Texas	20
Beckley Newspapers Corp. v Hanks, 389 U.S. 81 (1967)	15, 41
Garrison v Louisiana, 379 U.S. 77	14
Gertz v Welch, 418 U.S. 323 (1974)	13, 44
Greenbelt Cooperative Pub. Assoc. v Bresler, 398 U.S. 6 (1970)	25
Henry v Collins, 380 U.S. 356 (1965)	41
Jacobellis v Ohio, 378 U.S. 184	23
New York Times v Sullivan, 376 U.S. 254 (1964)	13, 15, 18, 23, 43
Ocala Star-Banner v Damron, 401 U.S. 295 (1971)	15
Patriot Co. v Roy, 401 U.S. 265 (1971)	42
Restatement of Torts, Sec. 5808	37
Rosenblatt v Baer, 383 U.S. 75 (1966)	26, 44, 46
Rosenbloom v Metromedia, 403 U.S. 29 (1971)	22
Time v Pape, 401 U.S. 279 (1971)	26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-926

LAREDO NEWSPAPERS, INC.,
Petitioner

VS

JOHN E. FOSTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION AND RESPONDENT'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

I

STATEMENT OF THE CASE

This is a suit for damages for an alleged

libel brought by John E. Foster, a Registered Engineer performing services for the general public as well as for political subdivisions, who was also the duly elected County Surveyor of Webb County, Texas, against the Laredo Newspapers, Inc., publisher of The Laredo Times, the only daily newspaper published in Webb County, Texas. The questions before the trial court, which granted summary judgment for the defendant newspaper, were the "public official-public figure" concept as established by this Honorable Court and, when before the Supreme Court of Texas, what standards the State of Texas would establish in suits by a private individual against the news media that would still be in keeping with the constitutional guidelines set by this Court. The Respondent denies that the Statement of the Case by the Petitioner is a fair one, but instead refers this Honorable Court to the opinion of the Supreme Court

of Texas, which gives a full and fair presentation of the facts. See pp. 1b thru 4b of Appendix B attached hereto, being a copy of the opinion of the Supreme Court of Texas.

II

The citations by Petitioner of the opinions below are correct.

III

Respondent admits that this Court has jurisdiction.

IV

The Respondent denies that the Questions Presented by Petitioner are the proper issues before this Court.

Question No. 1: "In a libel suit brought by an elected public official, whether a State Supreme Court can refuse to apply the malice standard on the grounds that the newspaper article contained no reference to the Plaintiff's

official position, and therefore did not relate to his official conduct." (p. 2 of Petitioner's Petition)

does not correctly state the holding of the Supreme Court of Texas in that the opinion of the Supreme Court of Texas makes it clear that the "no reference" theory was not the sole basis of its decision.

Question No. 2: "In a libel suit brought by an elected public official, even if the 'official conduct' concept still has any vitality, can the question of whether or not the allegedly libelous statements relate to the Plaintiff's fitness for office be left to a jury to decide as a fact question?" (pp. 2 and 3 of Petitioner's Petition)

is not properly before this Court, and the Court is merely being asked to render an advisory opinion.

Question No. 3: "Whether a professional

engineer hired by a County Commissioners Court and paid with public funds to advise the Court on flooding problems which had caused public complaint is not a 'public official' or 'public figure' for purposes of a newspaper article concerning those same flooding problems and public complaints merely because he had no personal interest in the problem and did not seek publicity for his role in the controversy." (p. 3 of Petitioner's Petition).

does not correctly state the holding of the Supreme Court of Texas in that it refers only to a portion of the opinion of the Supreme Court and seeks to intimate that the decision of the Supreme Court of Texas was based solely on the finding that "He (Respondent) had no personal interest in the pro-

blem and did not seek publicity for his role in the controversy."

Question No. 4: "Whether the applicability of the malice standard to libel suits by public officials depends upon the amount of public interest manifested toward that official prior to the alleged libel." (p. 3 of Petitioner's Petition)

again intimates that the decision of the Supreme Court of Texas rested solely on the ground stated therein, when the opinion of the Supreme Court of Texas clearly shows such is not the case.

Question No. 5: "Whether an erroneous factual statement that an engineer had platted a certain residential area, in the context of a newspaper article discussing flooding problems in that area, would warn a reasonably prudent editor of its defamatory potential and thus form the

basis for civil liability based only on a negligence standard. " (p. 3 of Petitioner's Petition)

is not based upon a true statement of the facts adduced by Summary Judgment evidence.

V

The Respondent admits that the Constitutional provisions involved are properly presented.

VI

The Respondent denies that there is any valid reason for this Honorable Court to grant the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of Texas, and in support of this position states:

THE HOLDINGS OF THE
SUPREME COURT OF TEXAS

The Texas Supreme Court in an opinion that carefully and ably considers and follows the dictates of this Honorable Court in its decisions in libel cases has held:

1. We HOLD that the summary judgment proof failed to establish that Foster's position as a consulting engineer possessed "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." (See p. 8b of App. B).

2. Finally, it cannot be doubted that the New York Times rule applies to any candidate for public office, even a candidate for a position such as county surveyor, at least during the course of the election campaign. It would be somewhat incongrous to hold that a candidate for public office is a public person during the campaign but loses that status upon taking office. We therefore conclude that Foster was a "public official" for purposes of the New York Times rule. (See p. 10b of App. B).

3. We hold, however, that the summary judgment evidence failed to establish the applicability of the New York Times rule because the allegedly libelous statements in the newspaper article did not clearly relate to Foster's "official conduct" as a county surveyor. (See p. 10b of App. B)

The Court under this holding further holds that:

> In the instant case, however, the newspaper article containing the allegedly libelous statements made no express reference to Foster's fitness for the office of county surveyor, nor was it concerned with Foster's performance of his official duties. Instead, the article discussed Foster's activities as "consultant engineer for Webb County." (See p. 11b of App. B).

However, if the article contained no

reference, implied or otherwise, to Foster's position as county surveyor, it could not be said that the article related to his fitness for the office. (See p. 12b of App. B)

Based upon the summary judgment evidence presented we cannot conclude that the article in question contained any implied reference to Foster's position as county surveyor. In particular, Foster has shown that the duties and responsibilities of the county surveyor were minimal and that he was not opposed in any election for the position. (See p. 12b of App. B)

Thus, a fact issue was raised as to whether the allegedly libelous statements in the newspaper article referred to Foster's position as county surveyor. In order to establish the applicability of the New York Times rule the Newspaper must at least

prove upon the trial of this case that the article impliedly referred thereto. (See p. 13b of App. B).

4. In view of Foster's limited participation in the controversy giving rise to the allegedly libelous newspaper article, we consider it evidence that he "did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." 418 U.S. 323 at 352. We therefore hold that the summary judgment evidence failed to establish that Foster achieved the status of a public figure within the context of the local controversy over the flooding in Del Mar Hills. (See p. 17b of App. B).

5. We hold that a private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher

or broadcaster knew or should have known that the defamatory statement was false. In addition, the liability of a publisher or broadcaster of a defamatory falsehood about a private individual may not be predicated upon "a factual misstatement whose content (would) not warn a reasonably prudent editor or broadcaster of its defamatory potential." (See p. 22b of App. B)

6. In light of our adoption of a negligence standard in defamation actions instituted by private individuals such as Foster, the summary judgment rendered in favor of the Newspaper must be reversed. (See p. 23b of App. B)

* * * * * *

The petitioner states that its first reason for granting the writ is:

"THE TEXAS SUPREME COURT HAS PLACED AN UNWARRANTED AND UNPRECEDENTED RESTRICTION ON THE FREEDOM OF THE PRESS TO CRITICIZE PUBLIC OFFICIALS

IN DIRECT VIOLATION OF PRIOR RULINGS OF THE UNITED STATES SUPREME COURT." (See p. 7 of Petitioner's Petition).

The reason is not a valid one.

The public official concept as set forth initially by this Court in New York Times v Sullivan, 376 U.S. 254 (1964), is based on allegedly libelous statements regarding the official conduct of the official. In the opening paragraph of the opinion in that case by Mr. Justice Brennan, it is stated:

"We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."

That wording is reiterated throughout the opinion.

In Gertz v Welch, 418 U.S. 323 (1974), this Court stated:

"More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in Garrison v Louisiana, 379 US, at 77, 13 L Ed 2d 125, 85 S Ct 209, the public's interest extends to 'anything which might touch on an official's fitness for office . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.'"

In Beckley Newspapers Corp. v Hanks, 389 U.S. 81 (1967), this Court stated:

"In New York Times we held that the Constitution forbids recovery of damages in a civil libel action by a public official, such as respondent, 'for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - -that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' "

In the opinion by Mr. Justice Stewart in Ocala Star-Banner Co. v Damron, 401 U.S. 295 (1971), it is stated:

"The Star-Banner moved for a new trial, arguing that the case should have been sent to the jury under the 'actual malice' test laid down by this Court in New York Times Co. v Sullivan, 376 US 254, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412. The trial judge denied the motion on the

ground that New York Times and later cases 'relating to public officials or public figures in the official conduct of their office or position are not applicable to this cause of action which was founded upon a newspaper publication of the Defendants which was libelous per se and made no reference to the public offices held or sought by the Plaintiff.' The Florida District Court of Appeal affirmed the judgment, holding that:

'An examination of the defamatory publication which gave rise to this case reveals that the plaintiff's official conduct or the manner in which he performed his duties were not the basis for the inaccuracy here involved; and, hence, it does not come within the protection afforded by the rule announced in the New York Times case. It follows therefore that the trial judge correctly held that it was unnecessary for the plaintiff to show malice.' 221 So 2d 459, 461.

The Supreme Court of Florida refused to review the judgment, 231 So 2d 822, and we granted certiorari to consider the federal constitutional issues presented. 397 US 1073, 25 L Ed 2d 808, 90 S Ct 1524."

"The respondent urges us that a basis for distinguishing New York Times does exist, because the rule of that case applies only to 'official conduct,' and a charge of indictment for perjury committed during testimony in a federal civil rights suit is a purely 'private' libel. This contention is disposed of by our decision today in Monitor Patriot Co. v Roy, supra. In that case we held that a charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is always 'relevant to his fitness for office' for purposes of

applying the New York Times rule of knowing falsehood or reckless disregard of the truth. Public discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the New York Times rule. And under any test we can conceive, the charge that a local mayor and candidate for a county elective post has been indicted for perjury in a civil rights suit is relevant to his fitness for office."

In its note, (See Note 4) the Court stated:

"4. New York Times Co. v Sullivan, 376 US 254, 283 n 23, 11 L Ed 2d 686, 708, 84 S Ct 710, 95 ALR2d 1412.

Both the trial judge on motion for new trial and the District Court of Appeal rested their conclusion that New York Times did not apply partly on the ground that the

defamatory article nowhere mentioned the respondent's status as mayor of Crystal River or as a candidate for county tax assessor. The respondent has not pursued that theory here."

In its opinion, the Supreme Court of Texas has stated: (See p. 9b of App. B).

"The Newspaper also urges that Foster was a 'public official' under the New York Times rule in his capacity as elected county surveyor and that the allegedly libelous statements in the newspaper article were relevant to his fitness for that elected position. On the other hand, Foster points to the summary judgment proof which indicates that the office of county surveyor entails minimal responsibilities and has become virtually obsolete in recent years. According to Foster, he occupied the office as a matter of convenience to the County because

the County was required by statute to elect a surveyor. Furthermore, Foster was paid no salary as county surveyor, and he had no staff provided by the County. During the seven and one-half years that he held the position Foster made an occasional patent survey for the County, but he performed no other duties in his official capacity."

Article 5282a of the Revised Civil Statutes of the State of Texas, defines the term "Public Surveying". (See p. 1a of Appendix A attached hereto). Article 5283 provides for the election of a county surveyor (See p. 2a of Appendix A), and Article 5287 sets forth his duties (see p. 3a of Appendix A). Articles 5288 thru 5298 set forth other duties (see pp. 3a thru 10a of Appendix A).

These Texas Statutes and the summary judgment proof clearly show that by no stretch of the imagination is it the duty or obligation of a

County Surveyor as such in Texas to plat subdivisions. This type of engineering is now and always has been done by private engineers. In the allegedly libelous article it is stated that:

> "The Rice Development official said the flooded area in question was platted by Jack Foster, who doubles as a consultant engineer for the County."

The Supreme Court of Texas correctly held that the newspaper article did not clearly relate to Foster's "official conduct" as County Surveyor.

Petitioner contends that the Supreme Court of Texas based its decision on the "no reference" exception. Such is not the case, as is clearly shown by the Court's opinion. The Court merely added this as a possible additional ground for holding that New York Times was not applicable.

Petitioner further contends that the Court erred in holding that a jury can be allowed to

decide as a fact issue whether or not the offending publication is related to the subject's official conduct for purposes of applying the First Amendment privilege. Of course this question is not actually before this Court, and this Court is being asked to render an advisory opinion on this point. But respondent respectfully contends that what this Court has held in its previous decisions is that the public official-public figure concept is a question of law to be determined in the first instance by the trial court, but that other questions may, if the evidence warrants, be submitted to the jury, SUBJECT to the right of the Supreme Court to review the entire record. See Rosenbloom v Metromedia, 403 U.S. 29 (1971), in which this Court stated:

> "Clearly, then, this Court has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,'

and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.' Jacobellis v Ohio, 378 U.S. 184, 190, 12 L Ed 2d 793, 799, 84 S Ct. 1676 (1964). The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's de novo review." See also New York Times v Sullivan, 376 U.S. 254 (1964) wherein it is stated:

"We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

I.

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court--that 'The Fourteenth Amendment is directed against State action and not private action.' That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action and that it is common law only, though supplemented by statute. See e.g., Alabama Code, Tit. 7, Secs. 908-907. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."

See also Greenbelt Cooperative Publishing Assoc.

v Bresler, 398 U.S. 6 (1970), in which case this Court stated:

"This, however, does not end the inquiry. As we noted in New York Times, '(t)his Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied . . . We must 'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.' "

The news media obviously would prefer that in libel cases, all questions be those of law for decision by the Courts rather than some of fact for findings by a jury. But such cannot be the case, for as Mr. Justice Black (joined by Mr. Justice Douglas) states in the separate opinion in

Rosenblatt v Baer, 383 U.S. 75 (1966):

"Finally, since this case is to be sent back and a new trial may follow, I add one further thought. The Court indicates that in a retrial it will be for the trial judge 'in the first instance' to decide whether respondent is a 'public official'. Statements like this have a way of growing and I fear that the words 'in the first instance' will soon be forgotten. When that happens the rule will be that the Federal Constitution forbids States to let juries decide essentially jury questions in libel cases."

See also the statement of Mr. Justice Harlan in his dissent in Time v Pape, 401 U.S. 279 (1971):

"While it is true, of course, that this Court is free to reexamine for itself the evidentiary bases upon which rest decisions that allegedly impair or punish the exercise of Fourteenth Amendment Freedoms, this does not mean

that we are of necessity always, or even usually, compelled to do so. Indeed, it is almost impossible to conceive how this Court might continue to function effectively were we to resolve afresh the underlying factual disputes in all cases containing constitutional issues. Nor can I discern in those First Amendment considerations tha led us to restrict the States' powers to regular defamation of public officials any additional interest that is not served by the actual-malice rule of New York Times, supra, but is substantially promoted by utilizing this Court as the ultimate arbiter of factual disputes in those libel cases where no unusual factors, such as allegations of harassment or the existence of a jury verdict resting on erroneous instructions, cf. New York Times, supra, are present. While I am confident that the Court does not intend its decision to have any such broad reach, I fear that what is done today may open a

door that will prove difficult to close."

* * * * * *

The Petitioner states that its second reason for granting the writ is that:

> "THE TEXAS SUPREME COURT SERIOUSLY MISINTERPRETED PRIOR DECISIONS OF THIS COURT BY HOLDING THAT A PROFESSIONAL CONSULTANT PAID BY PUBLIC FUNDS TO ADVISE A GOVERNMENTAL BODY ON A MATTER OF PUBLIC CONCERN WAS NOT AT LEAST A 'PUBLIC FIGURE.' "

The reason is not a valid one.

In spite of the fact that the Petitioner states that: " ... The Texas Supreme Court has fundamentally misread and misunderstood the holding in the Gertz case---", it is readily apparent that the Texas Supreme Court meticulously followed the rulings of this Court when it held that the Respondent was not a public figure merely because he was employed by the County as a

private engineer to make a study of a County problem.

In quoting from Gertz, the Texas Supreme Court stated:

"In determining whether Gertz possessed the necessary characteristics of a 'public figure,' the Court observed that 'public figures' fall into two general categories:

'In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.' (Emphasis added). 418 U.S. 323 at 351." (See pp. 14b and 15b of App. B). The Court then stated:

"There is nothing in the summary judgment evidence to indicate that Foster achieved pervasive fame or notoriety in the community. It appears that Foster certainly did not possess any greater fame or notoriety in his community than the plaintiff in Gertz who 'served as an officer of local civil groups and of various professional organizations, and ...published several books and articles on legal subjects.' 418 U.S. 323 at 351. We therefore hold, as did the Court in Gertz that Foster did not achieve the status of 'a public figure for all purposes and in all contexts.'" (See p. 15b of App. B).

And finally the Court held:

"In view of Foster's limited participation in the controversy giving rise to the alleged-

ly libelous newspaper article, we consider it evidence that he 'did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.' 418 U.S. 323 at 352. We therefore hold that the summary judgment evidence failed to establish that Foster achieved the status of a public figure within the context of the local controversy over the flooding in Del Mar Hills."

(See p. 17b of App. B).

In attempting to convince this Court that all persons paid in whole or in part by public funds should be classified as a matter of law as "Public Figures" for the purpose of establishing their rights when libeled, the Court is being asked to extend the New York Times privilege to a very large percentage of the population of this country and to essentially make the demanding standard

of New York Times applicable in all libel cases. This is the danger that faces us, not the emotional and unrealistic argument that the decision of the Supreme Court will have a "chilling" effect on freedom of the press. As Justice White stated in his dissent in Gertz:

> ".....The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition, and the Court furnishes none.

The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home. Neither the industry as a whole nor its individual components are easily intimidated, and we are fortunate that they are not. Requiring

them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence."

Eight Judges of the Supreme Court of Texas concurred in the initial opinion. One dissented. A Motion for Rehearing was filed and amicus curiae briefs were filed by Texas Daily Newspaper Association, The Times Herald Printing Company, publisher of the Dallas Times Herald, Mediatex Communications Corp., publisher of Texas Monthly and A. H. Belo Corporation, publisher of The Dallas Morning News and other publications. On Motion for Rehearing, two additional judges dissented. One did not sit.

* * * * * *

The Petitioner states that its third reason for granting the writ is that:

"THIS CASE WILL ENABLE THE UNITED STATES SUPREME COURT TO DEFINE THE LIABILITY STANDARD WHICH THE STATES MAY ADOPT IN SUITS INVOLVING A DEFAMATION, THE SUBSTANCE OF WHICH DOES NOT MAKE SUBSTANTIAL DANGER TO REPUTATION APPARENT."

The reason is not a valid one.

The Summary Judgment proof definitely shows that the petitioner misquoted its informant (Mr. Rice stated on deposition that he did not say the flooded area in question was platted by the respondent) and further that the misquote was in itself false. The Summary Judgement proof further shows that the representatives of the petitioner knew that a great amount of private criticism was being directed at whomever had platted the area because it was so platted that proper drainage was not achievable and flooding of the area resulted. The Summary Judgment proof further shows that the representatives of

the petitioner knew that the Respondent had been employed by the County to investigate the flooding problem.

It is abundantly clear that in making the statement that: "The Rice Development official said the flooded area in question was platted by Jack Foster, who doubles as a consultant engineer for Webb County." the article, either directly or by innuendo, pointed out to the readers of the newspaper that:

(a) The Respondent was a private engineer not capable of properly laying out a subdivision.

(b) That he was being paid by the County to investigate the results of his own ineptitude.

The Supreme Court of Texas correctly held:

"We hold that a private individual may recover damages from a publisher or broad-

BEST COPY AVAILABLE

caster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false. In addition, the liability of a publisher or broadcaster of a defamatory falsehood about a private individual may not be predicated upon 'a factual misstatement whose content (would) not warn a reasonably prudent editor or broadcaster of its defamatory potential.'" (See p. 22b of App. B).

In its note, (See Note 15 at p. 22b of App. B), the Court stated:

"The Court added the following caveat in Gertz: 'Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential.' 418 U.S. 323 at 348.

We interpret the caveat to mean that no liability may be predicated upon a statement whose content would not warn a reasonably prudent editor or broadcaster of its defamatory potential. See RESTATEMENT (Second) OF TORTS, Sec. 5808, comment c at 28-9 (Tent. Draft No. 21, 1975). An editor or broadcaster who has taken reasonable precautions to assure that his statements will not be injurious to reputation is no less deserving of protection from libel actions than one who had made a reasonable inquiry to determine the truth of his statements. With respect to the instant case, the summary judgment proof fails to establish that the allegedly libelous statements were insufficient to warn a reasonably prudent editor or broadcaster of their defamatory potential."

SUMMARY OF ARGUMENT

The Supreme Court of Texas has correctly held that the New York Times standard is not applicable in this case because the allegedly libelous statements do not refer to the official conduct of the Respondent, and that the Respondent as a matter of law was not a "public figure." In doing so the Supreme Court of Texas has followed the dictates of this Court. Under Gertz, supra, the Supreme Court of Texas has exercised its prerogative to adopt a negligence standard in cases involving an allegedly libelous statement by the news media regarding a private individual.

CONCLUSION

The Petitioner's Petition for a Writ of Certiorari to the Supreme Court of Texas should be denied.

RESPONDENT'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The Respondent petitions for a writ of certiorari to the Supreme Court of Texas to review that portion of the judgment of the Supreme Court of Texas holding as a matter of law that the Respondent was a "public official" as that term is used by this Court in libel cases, (See p. 10b of App. B) however, only in the event that this Court grants Petitioner's Petition for a Writ of Certiorari.

QUESTION PRESENTED

1. Did the Supreme Court of Texas err in holding as a matter of law that the Respondent was a "public official" as that term is used by this Court in libel cases?

STATEMENT

In its opinion the Supreme Court of Texas stated:

> "The Newspaper also urges that Foster was a 'public official' under the New York Times rule in his capacity as elected county surveyor and that the allegedly libelous statements in the newspaper article were relevant to his fitness for that elected position. On the other hand, Foster points to the summary judgment proof which indicates that the office of county surveyor entails minimal responsibilities and has become virtually obsolete in recent years. According to Foster, he occupied the office as a matter of convenience to the County because the County was required by statute to elect a surveyor. Furthermore, Foster was paid no salary as county surveyor, and he had no staff provided by the County.

During the seven and one-half years that he held the position Foster made an occasional patent survey for the County, but he performed no other duties in his official capacity.

Although the summary judgment proof certainly established that Foster was a member of the lower echelons of the County government, we note that the United States Supreme Court has not reserved the 'public official' designation for high-level public officers alone. Time v. Pape, 401 U.S. 279 (1971) (deputy chief of detectives); St. Amant v Thompson, 390 U.S. 727 (1968) (deputy sheriff); Beckley Newspapers v Hanks, 389 U.S. 81 (1967) (elected clerk of county criminal and circuit courts); Henry v. Collins, 380 U.S. 356 (1965) (county attorney). More important, the definition

BEST COPY AVAILABLE

of 'public official' in Rosenblatt v. Baer, supra, is keyed to the apparent importance of the official position and the public interest in such position. It may be presumed that a certain amount of public interest exists with regard to any governmental position if the general public selects the person who holds the position through the election process. In recognition of the special public interest in elected officials, the Supreme Court has held that the constitutional guarantees of free speech and press have their 'fullest and most urgent application' to the election process. Patriot Co. v Roy, 401 U. S. 265 (1971). Finally, it cannot be doubted that the New York Times rule applies to any candidate for public office, even a candidate for a position such as county surveyor, at least during the course of

the election campaign. It would be somewhat incongrous to hold that a candidate for public office is a public person during the campaign but loses that status upon taking office. We therefore conclude that Foster was a 'public official' for purposes of the New York Times rule."

(See pp. 9b and 10b of App. B).

REASONS FOR GRANTING THE WRIT

While Respondent does not consider the question posed in this cross-petition proper to call independent review by this Court, it is believed that it should be reviewed if, but only if, the Court grants Petitioner's Petition for a Writ of Certiorari.

In New York Times v Sullivan, supra, this Court stated in Note 23:

"We have no occasion here to determine how far down into the lower ranks of government

employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included."

In Gertz v Welch, supra, this Court stated:

"Notwithstanding our refusal to extend the New York Times privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position."

In Rosenblatt v Baer, supra, this Court stated:

"It is clear, therefore, that the 'public

official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

"* * *Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in New York Times are present and the New York Times malice standards apply."

In Note 13, it is stated:

"It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the New York Times malice standards apply could not be reached merely

because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasional by the particular charges in controversy."

In Mr. Justice Douglas' dissent in Rosenblatt, he states:

"The article here sued on as libelous discusses the use of the public's money to take care of the public's business by a paid agent of the public."

Under these standards and under the summary judgment proof, Respondent submits that he would not come under the "public official" concept.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, if the Court grants Petitioner's Petition for a Writ of Certiorari, then it should also grant this Conditional Cross-Petition for a Writ of Certiorari.

Respectfully submitted,

J. G. Hornberger
J. G. Hornberger, Jr.
915 Victoria St.
Laredo, Texas 78040
(512) 722-1121
Attorneys for Respondent

by: J. G. Hornberger

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 1977, a copy of Respondent's Brief in Opposition and Conditional Cross-Petition for a Writ of Certiorari was mailed to George P. Kazen,

of the Firm of Mann, Castillon, Freed & Kazen, P. O. Box 820, Laredo, Texas, 78040, Attorneys for Petitioner.

J. G. Hornberger

APPENDIX A

ARTICLE 5282a, Sec. 2 (b), of the Revised Civil Statutes of Texas--Definition of "Public Surveying":

Public Surveying is the science or practice of land measurement according to established and recognized methods engaged in and practiced as a profession or service available to the public generally for compensation, and comprises the determination by means of survey, of the location or relocation of land boundaries and land boundary corners; the calculation of area and the preparation of field note description of surveyed land; the preparation of maps showing the boundaries and areas of the subdivision of tracts of land into smaller tracts; the preparation of official plats or maps of said land and subdivisions in compliance with the laws of the State of Texas and the political subdivisions thereof; and such other duties as

sound surveying practice would direct.

A public Surveyor is any person engaged in public surveying as defined in this Act, and who is employed as a surveyor or who holds himself out to the public as such.

****

ARTICLE 5283 of the Revised Civil Statutes of Texas --Election

A county surveyor shall be elected in each county at each general election for a term of two years. He shall reside in the county and keep his office at the courthouse or some suitable building at the county seat, the rent therefor to be paid by the commissioners' court on satisfactory showing that the rent is reasonable, the office necessary and that there is no available office at the courthouse. Const., art. 6, sec. 44; Acts 1858, p. 66; Acts 1876, p. 196; G. L. Vol. 4, p. 938; vol. 8, p. 1032.

ARTICLE 5287 of the Revised Civil Statutes of Texas-- Duties

Each county surveyor shall receive and examine all field notes of surveys made in said county upon which patents are to be obtained, and shall certify to the same according to law and record such field notes in a book to be kept by him for that purpose; and he shall perform such other duties as may be required of him by law. The commissioners' court shall furnish him all necessary books of record.

* * * * *

ARTICLE 5288 of the Revised Civil Statutes of Texas--Inclosed school lands

He shall report to the commissioners' court on the first Monday in June each year the number of sections of public school lands in his county inclosed during the past year, and the

names of the persons controlling same, and the number of sections controlled by each person. Acts. 1879, p. 101; G. L. vol. 9, p. 1401.

* * * * *

ARTICLE 5289 of the Revised Civil Statutes of Texas --Failure to survey

If any county surveyor fails, neglects or refuses, when the amount of lawful surveying fees of any location of land may be tendered to him by any person legally entitled to the survey, to make or cause such survey to be made within one month after such tender, he and his sureties shall be liable on his official bond to such injured parties in the amount of damages or injury said parties may sustain by reason of such neglect, refusal or failure. Acts 1837, p. 63; G. L. vol. 1, p. 1405.

* * * * * * * *

ARTICLE 5290 of the Revised Civil Statutes of Texas-- To record field notes

Each county surveyor shall record in a well bound book all the surveys in his county, with the plats thereof that he may make, whether private or official. Such record shall be open to the inspection of the public. For such service the surveyor may charge in addition to the fees allowed by law for field work, twenty cents per hundred words for such record. Acts 1881, p. 71; G. L. vol. 9, p. 163.

* * * * * * * *

ARTICLE 5291 of the Revised Civil Statutes of Texas-- Record of surveys

Each county surveyor shall quarterly plat upon the map of his county all surveys made during the preceding quarter and transmit sketches and field notes of same to the Commissioner. Such map shall be free to public inspection. Acts 1858, p. 66; P. D. 1087; G. L. vol. 4, p. 938.

ARTICLE 5292 of the Revised Civil Statutes of Texas--Right to examine books

Any person interested, for himself or as agent or attorney of another, shall at all times have the right to examine the books, papers, plats, maps or other archives belonging to the office of any surveyor, on the payment of the fee fixed by law.

* * * * *

ARTICLE 5293 of the Revised Civil Statutes of Texas--Change of county boundary

When any county boundaries are changed the surveyor of the county from which territory may be so taken shall furnish the surveyor of the county including such territory with a complete copy of all the field notes of surveys made in the same. Acts 1840, p. 191; G. L. vol. 2, p. 365.

* * * * *

ARTICLE 5294 of the Revised Civil Statutes of Texas--Lost records

Whenever the maps, field notes of surveys, or other records, or any part thereof of the surveyor's office shall from any cause be lost or destroyed, such surveyor shall obtain from the Commissioner a transcript of such lost records certified to as required by law, and which certified copy shall have the same force and effect as the original. Such surveyor shall receive five cents and the State ten cents per hundred words for such transcript to be paid by the commissioners court. Acts 1885, p. 92; Amend. Sen. Jour. p. 482, 1895; G. L. Vol. 9, p. 712.

* * * * * *

ARTICLE 5295 of the Revised Civil Statutes of Texas--Standards of measure

Each surveyor shall, in some convenient

place at the county seat, establish a true meridian by a substantial monument, to be erected at the expense of the county, and shall adjust to the said meridian all compasses or other such instruments before being used; and shall keep in his office a standard chain of the true measurement of ten varas, to which all of his chains shall be adjusted before being used. All surveyors shall be responsible to parties interested for any cost that may accrue in rectifying any errors that may occur in their work by reason of neglect or failure to comply with the requirements of this article. Acts 1873, p. 173; P. D. 7099; G. L. vol. 7, p. 625.

* * * * * * *

ARTICLE 5296 of the Revised Civil Statutes of Texas--Removal: delivery of records

Upon removal from office, or at the expiration of his term of office, each county surveyor shall deliver to his successor all records

books, papers, maps and other things appertaining to his office.

* * * *

ARTICLE 5297 of the Revised Civil Statutes of Texas--Custody of records in absence

Whenever an organized county from any cause has not a qualified county surveyor, the county clerk of such county shall take charge of all records, maps and papers belonging to the county surveyor's office and safely keep the same in his office. Acts 1866, p. 32;G. L. vol. 5, p. 949.

* * * *

ARTICLE 5298 of the Revised Civil Statutes of Texas--Bound records

Whenever the commissioners court deems it necessary it shall order the surveyor's record to be transcribed in good and substantial books, by the surveyor or special deputies sworn to

make true copies of the same, for which services they shall be allowed not more than fifteen cents per hundred words, to be paid out of the county treasury. Acts S. S. 1871, p. 18; G. L. vol. 7, p. 20.

APPENDIX B

IN THE SUPREME COURT OF TEXAS

No. B-5747

JOHN E. FOSTER,

Petitioner,

v.

LAREDO NEWSPAPERS, INC.,

Respondent.

FROM WEBB COUNTY, FOURTH DISTRICT

This libel action instituted by John Foster against Laredo Newspapers, Inc. affords this court an opportunity to interpret recent rulings of the United States Supreme Court that establish differing standards of care applicable to various classes of defamation plaintiffs. The trial court rendered a take-nothing summary judgment in favor of the defendant Newspaper and the court of civil appeals affirmed. 530 S.W.2d 611. We reverse and remand the case for trial.

The plaintiff Foster is a licensed civil engineer engaged in private engineering practice in Laredo, Texas. Additionally, Foster is the duly elected county surveyor of Webb County. He also has been regularly hired by the County as a private consulting engineer to perform specific projects. One such private consulting project involved the investigation by Foster of a flooding problem in a subdivision known as Del Mar

Hills. On June 17, 1973 an article printed in the Laredo Times newspaper in connection with the flooding problem made the following references to Foster:

> "The Rice development official said the flooded area in question was platted by Jack Foster, who doubles as a consultant engineer for Webb County.
>
> "Foster has been handling numerous engineering jobs for the Commissioners Court on a consultant basis involving road improvements, some paving, park recreational work and drainage problems in Del Mar Hills."

The article resulted from a recent flooding incident and an appearance before the commissioner's court of Webb County by a resident of Del Mar Hills complaining of the flooding problem in his subdivision. Following the meeting of the commissioner's court an initial article appeared in the Laredo Times covering the court hearing on the flooding problem. One week later that Newspaper published a follow-up article on the flooding problem, and it was this second article which contained the allegedly libelous statements upon which this action is based. The second article was prompted by a contractor engaged in development of the subdivision who complained to the Newspaper that the first article left a misleading impression that the flooding problem existed throughout Del Mar Hills. The article quoted the contractor's statements at length with regard to the nature of the flooding and his opinion that the County should solve the flooding problem. The statement in the article that Foster platted the flood area was false.

Foster filed this action against Laredo Newspapers, Inc. alleging that the article was libelous because (1) it attributed to him "direct responsibility for the severe flooding of homes located in said Del Mar Hills, thereby indicating that [Foster's] work was of inferior and unsatisfactory quality," and (2) the phrase "who

BEST COPY AVAILABLE

doubles as consultant engineer for Webb County" used in the article indicated that Foster "was performing services for the County of Webb and other parties when a direct conflict of interest between the said County and other said parties existed, and that therefore [Foster] was guilty of unethical and illegal conduct." Foster sought $250,000 as damages for the allegedly libelous statements and an additional $125,000 punitive damages.

The Newspaper filed a motion for summary judgment on the grounds that Foster is either a "public official" or "public figure" as defined by the Supreme Court of the United States in the line of decisions beginning with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and consequently there could be no liability without a showing of "actual malice." The Newspaper further contended that the undisputed evidence in the record negated a finding of "actual malice."

The trial court sustained the Newspaper's motion for summary judgment and the court of civil appeals affirmed holding that "Foster clearly falls within the most restrictive definition of a 'public official' or a 'public figure,' and we hold that he was both a public official and a public figure as those terms are defined by the courts of this state and of the United States." 530 S.W.2d 611 at 616. The court further held that the summary judgment proof "establishes as a matter of law that such publication was not made with malice as that term is defined in the applicable state and federal court decisions." 530 S.W.2d 611 at 619.

Foster's principal points of error attack the holding of the court of civil appeals (1) that he was either a "public official" or "public figure," and (2) that the summary judgment proof negated the existence of a fact issue with respect to the question of malice. The initial and crucial question is whether the court of civil

appeals correctly classified Foster as a "public official" or "public figure."

I. PUBLIC OFFICIAL

In *New York Times Co. v. Sullivan*, *supra*, the Supreme Court of the United States, for the first time, considered the extent to which the constitutional protections for speech and press limit recovery in a libel action brought by a public official against critics of his official conduct. The plaintiff, an elected city commissioner whose duties included supervision of the city's police department, brought suit in a state court alleging that he had been libeled by an advertisement printed in the New York Times newspaper. The advertisement included statements, some of which were false, about action by the city police directed against students who participated in a civil rights demonstration and against a leader of the civil rights movement. Following a jury verdict for the plaintiff and affirmance by the state supreme court, the case was reviewed by the Supreme Court of the United States which reversed and remanded holding that the constitutional guarantees of the First and Fourteenth Amendments require *"a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' that is, with knowledge that it was false or with reckless disregard of whether it was false or not."*[1] [Emphasis added.] 376 U.S. 254 at 279-80. In so holding the Court recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust,

[1] Hereinafter referred to as the *New York Times* rule

BEST COPY AVAILABLE

and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. 254 at 270. The Court further reasoned that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.' " 376 U.S. 254 at 279.

In *New York Times* the Court did not attempt to define the "public official" and "official conduct" concepts, but left determination of the scope of these concepts for future cases.[2] Further explanation of the "public official" concept was then provided by the United States Supreme Court in *Rosenblatt v. Baer*, 383 U.S. 75 (1966). The plaintiff in *Rosenblatt* was not an *elected* official but, rather, a former supervisor of a county recreation area who was employed by and directly responsible to the county commissioners. His libel action was brought against a local newspaper for publication of a column that allegedly criticized the financial management of the recreation area while it was under the plaintiff's supervision. In deciding whether to classify the plaintiff as a public official, the Court set forth the competing values that must be weighed and formulated a broad definition of the "public official" concept. First, the Court emphasized that there is a strong interest in debate on public issues and about persons who are in a position to influence the resolution of those issues.

[2]The Court stated: "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. . . . Nor need we here determine the boundaries of the 'official conduct' concept." 376 U.S. 254 at 283 n. 22.

> "Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." 383 U.S. 75 at 85.

Secondly, the Court recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." In balancing society's interest in protecting the reputations of its citizens and the constitutional values of free speech and press, the Court unmistakably concluded that the "public official" designation does not apply to *all* government employees.[3] Rather, the designation applies "[*w*]*here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees.*" [Emphasis added.] 383 U.S. 75 at 86.

In determining whether Foster was a "public official" for purposes of the *New York Times* rule, two aspects of Foster's relationship with the county government must be examined. Foster was, first, a private consulting engineer who was from time to time employed by the County and, second, he was the duly elected county surveyor.

The Newspaper contends that the *New York Times* rule is applicable because Foster was a "public official" in his capacity as a private consulting engineer employed by the County. The summary judgment proof shows that Foster was employed by the County as a private consulting engineer for numerous projects and, according to the county judge, Foster performed the

[3]In *Rosenblatt* the Court left open the possibility that on remand the plaintiff could adduce proofs that he was not a "public official."

large majority of the County's engineering jobs. Nevertheless, Foster had no permanent engineering position with the County and it was undisputed that the County also hired other consulting engineers. Therefore, Foster must be treated as a temporary employee of the County and the applicability of the *New York Times* rule must be determined with reference to the particular engineering project discussed in the allegedly libelous article.[4]

Foster's involvement with the flooding problems in Del Mar Hills as a consulting engineer for the County dated back to April 1971 when he was employed by the commissioner's court to conduct an inspection of the newly constructed streets and storm drainage system in Del Mar Hills. Subsequently, in May and June 1972 when residents of the subdivision complained to the commissioner's court about recent flooding of their homes, Foster was employed to study the drainage problem and determine the availability of a federal grant to remedy the flooding problem. Finally, in June 1973 when a resident of Del Mar Hills again complained to the Commissioner's court about the recent flooding of his home, the court summoned Foster to appear

[4] Foster's status as a temporary employee of the County is supported by two additional considerations: (1) it appears that Foster's duties and responsibilities as a county employee varied considerably from one project to another; and (2) if there was any public interest in Foster's employment with the County it would naturally tend to focus on Foster's involvement in each particular engineering project.

before the court and advise it about the drainage problem.[5]

We HOLD that the summary judgment proof failed to establish that Foster's position as a consulting engineer possessed "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Rosenblatt v. Baer, supra*, at 86. The summary judgment proof showed that whatever public interest the flooding aroused was focused primarily on the commissioner's court which was attempting to determine the County's responsibility for the flooding problem. Although Foster occasionally reported his findings to the commissioner's court at public meetings, the record fails to show that the presentation of his reports stirred up any significant public interest. The apparent lack of public interest in Foster's activities was undoubtedly attributable to the fact that Foster had little if any authority to exercise on behalf of the County. The commissioner's court assigned Foster specific tasks, such as conducting a drainage study and determining the availability of a federal grant to solve the flooding problem, but the nature of these tasks, as described in the summary judgment proof, did not require that Foster

[5] It appears that Foster was not employed by the County on the date that the allegedly libelous newspaper article was printed. In *Rosenblatt v. Baer, supra*, the Court recognized that "there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the *New York Times* rule." 383 U.S. 75 at 87 n. 14. We deem it evident that Foster was not so far removed from his former position as a consulting engineer for the County with regard to the flooding problem as to render the *New York Times* rule inapplicable.

exercise a significant amount of discretion. Furthermore, it does not appear that Foster could personally authorize the expenditure of public funds to solve the flooding problem, nor did he supervise any other employees of the County. Another fact that probably explains the lack of public interest in Foster's activities was that Foster had very little public contact. There was apparently no public input with regard to Foster's employment by the commissioner's court to study the flooding problem. In addition, the tasks assigned to Foster did not require that he act in a representative capacity for the County or have any direct dealings with the public.

The Newspaper also urges that Foster was a "public official" under the *New York Times* rule in his capacity as elected county surveyor and that the allegedly libelous statements in the newspaper article were relevant to his fitness for that elected position. On the other hand, Foster points to the summary judgment proof which indicates that the office of county surveyor entails minimal responsibilities and has become virtually obsolete in recent years. According to Foster, he occupied the office as a matter of convenience to the County because the County was required by statute to elect a surveyor.[6] Furthermore, Foster was paid no salary as county surveyor, and he had no staff provided by the County. During the seven and one-half years that he held the position Foster made an occasional patent survey for the County, but he performed no other duties in his official capacity.

Although the summary judgment proof certainly established that Foster was a member of the lower echelons of the County government, we note that the United States Supreme Court has not reserved the

[6] TEX. REV. CIV. STAT. ANN. art. 5283.

"public official" designation for high-level public officers alone. *Time v. Pape*, 401 U.S. 279 (1971) (deputy chief of detectives); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (deputy sheriff); *Beckley Newspapers v. Hanks*, 389 U.S. 81 (1967) (elected clerk of county criminal and circuit courts); *Henry v. Collins*, 380 U.S. 356 (1965) (county attorney). More important, the definition of "public official" in *Rosenblatt v. Baer*, *supra*, is keyed to the *apparent* importance of the official position and the *public interest* in such position. It may be presumed that a certain amount of public interest exists with regard to any governmental position if the general public selects the person who holds the position through the election process. In recognition of the special public interest in elected officials, the Supreme Court has held that the constitutional guarantees of free speech and press have their "fullest and most urgent application" to the election process. *Patriot Co. v. Roy*, 401 U.S. 265 (1971). Finally, it cannot be doubted that the *New York Times* rule applies to any *candidate* for public office, even a candidate for a position such as county surveyor, at least during the course of the election campaign. It would be somewhat incongruous to hold that a candidate for public office is a public person during the campaign but loses that status upon taking office. We therefore conclude that Foster was a "public official" for purposes of the *New York Times* rule.

We hold, however, that the summary judgment evidence failed to establish the applicability of the *New York Times* rule because the allegedly libelous statements in the newspaper article did not clearly relate to Foster's "official conduct" as county surveyor. It is undoubtedly true that the United States Supreme Court has interpreted the "official conduct" concept very

broadly,[7] but all of the public official defamation cases considered by the Court, except one,[8] involved statements that referred to performance of official duties or fitness for office of government officials. In the instant case, however, the newspaper article containing the allegedly libelous statements made no express reference to Foster's fitness for the office of county surveyor, nor was it concerned with Foster's performance of his official duties. Instead, the article discussed Foster's activities as "consultant engineer for Webb County."

Nevertheless, the Newspaper seeks to invoke the *New York Times* rule on the grounds that the allegedly

---

[7] In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court stated: "The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant." 379 U.S. 64 at 77. Also, in *Patriot Co. v. Roy, supra*, the Court suggested that the "official conduct" concept has been substantially diluted: "Indeed, whatever vitality the 'offical conduct' concept may retain with regard to occupants of public office, cf. Garrison, supra, at 72 n. 8, 13 L. Ed 2d at 131, it is clearly of little applicability in the context of an election campaign." 401 U.S. 265 at 274.

[8] In *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971), the plaintiff, who was a mayor and candidate for county tax assessor, filed a libel action against a local newspaper as a result of an article which mistakenly stated that he had been indicted on perjury charges in a federal court. The article referred to the plaintiff as "local garage owner Leonard Damron" but did not mention that Damron was a mayor or a candidate for county tax assessor. The Court held that the *New York Times* rule was applicable but noted: "Both the trial judge on motion for new trial and the District Court of Appeal rested their conclusion that New York Times did not apply partly on the ground that the defamatory article nowhere mentioned the respondent's status as mayor of Crystal River or as a candidate for county tax assessor. The respondent has not pursued that theory here." 401 U.S. 295 at 300 n. 4.

libelous statements in the article were germane to Foster's fitness for the office of county surveyor. However, if the article contained no reference, implied or otherwise, to Foster's position as county surveyor, it could not be said that the article related to his fitness for the office. If such is the instance, the allegedly libelous statements did not concern Foster's "official conduct" and the *New York Times* rule would not be applicable. The "public official" rule set forth in the *New York Times* case was not meant to protect reporting of matters that have at best a coincidental bearing on governmental affairs. Of course, there may be instances where the absence of an express reference to an individual's official capacity is unimportant. Many public officials are so well-known in their communities that the general public automatically associates them with their official positions. In such instances an express reference in a newspaper article to the individual's official capacity is unnecessary and the reference is implied. Based upon the summary judgment evidence presented we cannot conclude that the article in question contained any implied reference to Foster's position as county surveyor.[9] In particular, Foster has shown that the duties and responsibilities of the county surveyor were minimal and that he was not opposed in any election for the position.

---

[9] The deposition testimony of the Newspaper's city editor who wrote the article in question indicates that he did not associate the statements in the article with Foster's qualifications for the office of county surveyor. According to the city editor, the sole purpose of the reference to Foster was to show that the County was aware of the flooding problem through Foster's activities as a consulting engineer. The city editor made the following response to a question by plaintiff's counsel:

"Q. In making the statement in the only daily newspaper published in this area that Mr. Jack Foster, whom you know to be a professional engineer, had so platted an area

(continued)

Thus, a fact issue was raised as to whether the allegedly libelous statements in the newspaper article referred to Foster's position as county surveyor. In order to establish the applicability of the *New York Times* rule the Newspaper must at least prove upon the trial of this case that the article impliedly referred thereto.[10]

II. PUBLIC FIGURE

The *New York Times* rule, which previously had been restricted in application to "public officials," was extended to cover "public figures" in *Curtis Publishing Company v. Butts*, and its companion case, *Associated Press v. Walker*, 388 U.S. 130 (1967). *Butts* involved publication of an article charging a well-known athletic director of a major university with having "fixed" a

(footnote continued from preceding page)

that it was subject to severe flooding, didn't you realize, Mr. Arambula, that this would hurt his reputation and that it would mark his work as being inferior and unsatisfactory?

"A. I would answer that negative, sir. The conservation here had nothing to do with Jack Foster. He [Mr. Rice, the contractor who was being interviewed] injected Jack into the conversation when this matter of the County being responsible and who should look out there and see what's wrong and who should take action to provide a remedy for these people because as I recall in the conversation I asked Mr. Rice—I suggested to him that he should pose this problem to the Commissioner's Court and again here he said, 'well, you know, they know about these problems, they're aware. . . .'"

[10]Although it is the task of the trial judge in the first instance to determine the existence of the privilege under the *New York Times* rule, *Rosenblatt v. Baer, supra*, at 88, the trial court may submit to the jury fact issues relating to the existence of the privilege.

BEST COPY AVAILABLE

football game. Although the plaintiff was the university's athletic director at the time the article was published, he was employed by a private corporation and not by the state itself. In *Walker* the allegedly libelous article charged the plaintiff with encouraging and leading rioters on a university campus in connection with a racial controversy. The Court stated that the plaintiff, who was a retired army general, "could fairly be deemed a man of some political prominence." Although the Court could not agree upon an opinion in *Butts* and its companion, *Walker*, a majority of the Court held that the plaintiffs in both cases were "public figures," and further held, through Mr. Chief Justice Warren's concurring opinion, that the *New York Times* rule applies to "public figures" as well as "public officials." Mr. Chief Justice Warren wrote:

> ". . . it is plain that although they are not subject to the restraints of the political process, 'public figures,' like 'public officials,' often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media communication, both to influence policy and to counter criticism of their views and activities." 388 U.S. 130 at 164.

Further elaboration of the public figure concept was provided by the Court in *Gertz v. Welch*, 418 U.S. 323 (1974). The plaintiff in *Gertz* was an attorney representing a murder victim's family in a civil suit against a police officer who was convicted for the murder. The basis for the libel suit was a magazine article in connection with the murder incident which falsely (1) implied that the plaintiff had a criminal record, (2) charged that the plaintiff was a "Leninist" or a "Communist-fronter," and (3) identified the plaintiff as a former official of a Marxist organization. In determining whether *Gertz* possessed the necessary character-

istics of a "public figure," the Court observed that "public figures" fall into two general categories:

> "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. *In either case such persons assume special prominence in the resolution of public questions.*" [Emphasis added.] 418 U.S. 323 at 351.

The Court first concluded that the plaintiff did not fit within the category of individuals who are "public figures" for all purposes and in all contexts. The Court then turned to the question whether the plaintiff was a public figure with respect to the particular controversy giving rise to the defamation, and concluded:

> "In this context it is plain that petitioner was not a public figure. . . . *He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.*" [Emphasis added.] 418 U.S. 323 at 352.

There is nothing in the summary judgment evidence to indicate that Foster achieved pervasive fame or notoriety in the community. It appears that Foster certainly did not possess any greater fame or notoriety in his community than the plaintiff in *Gertz* who "served as an officer of local civic groups and of various professional organizations, and . . . published several books and articles on legal subjects." 418 U.S. 323 at 351. We therefore hold, as did the Court in *Gertz*, that Foster did not achieve the status of "a public figure for all purposes and in all contexts."

With regard to Foster's status as a "public figure" within the context of the controversy over the flooding problem, our previous discussion of his role as a consulting engineer made clear that Foster did not assume a special prominence in the resolution of this controversy. Foster is clearly distinguishable from the plaintiff in *Walker* who, according to the Court, made a number of strong public statements related to federal intervention in racial matters and obtained wide publicity of his views. In addition, there is little resemblance between Foster and the plaintiff in *Butts* who was described by the Court as "a well-known and respected figure in coaching ranks" who may have attained "public figure" status by virtue of his position alone.

The summary judgment record does not indicate that Foster had any personal interest in the resolution of the flooding problem, and he remained strictly within his role as an adviser to the commissioner's court.[11] Consistent with his role as a private consulting engineer employed by the commissioner's court, Foster did not attempt to influence the outcome of the flooding

---

[11] A quite different situation was presented in *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6 (1970), where it was conceded that the plaintiff was a public figure in the community. The Court stated that "[t]his concession was clearly correct," emphasizing the following factors: "Bresler was deeply involved in the future development of the city of Greenbelt. He had entered into agreements with the city for zoning variances in the past, and was again seeking such favors to permit the construction of housing units of a type not contemplated in the original city plan. At the same time the city was trying to obtain a tract of land owned by Bresler for the purpose of building a school. Negotiations of significant public concern were in progress, both with school officials and the city council. Bresler's status thus clearly fell within even the most restrictive definition of a 'public figure.'" 398 U.S. 6 at 9-10.

controversy through exposure of his personal opinions in the media. Similar considerations influenced the United States Supreme Court to hold that the plaintiff in *Gertz* was not a "public figure" within the context of that particular controversy:

> "He [the plaintiff] played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so." 418 U.S. 323 at 352.

In view of Foster's limited participation in the controversy giving rise to the allegedly libelous newspaper article, we consider it evident that he "did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." 418 U.S. 323 at 352. We therefore hold that the summary judgment evidence failed to establish that Foster achieved the status of a public figure within the context of the local controversy over the flooding in Del Mar Hills.

III. STANDARD OF CARE

Having held that the summary judgment proof failed to establish that Foster was a "public figure" or that the allegedly libelous statements related to his official conduct, we must now determine whether Foster's right of recovery against the Newspaper as a private individual[12] nevertheless depends upon the *New York*

[12]We use the term "private individual" as encompassing "public officials" whose official conduct is not the subject of the allegedly libelous statement.

Times standard—knowledge of falsity or reckless disregard for the truth. The question whether the *New York Times* standard applies to private individuals such as Foster was first considered by the Supreme Court in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971). Although the majority of the Court could not agree upon an opinion in *Rosenbloom* Mr. Justice Brennan's plurality opinion did conclude that the *New York Times* standard applies in a libel action by a private individual against a licensed radio station for a defamatory falsehood relating to a matter of public or general concern.

Subsequently, in *Gertz v. Welch, supra*, a majority of the Court rejected the approach of the plurality opinion in *Rosenbloom* and held that states may define for themselves the appropriate standard of liability for a publisher or broadcaster of a defamatory falsehood injurous to a private individual "so long as they do not impose liability without fault." 418 U.S. 323 at 347. The Court reasoned that "[t]his approach provides a more equitable boundary between the competing concerns involved," and "recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." 418 U.S. 323 at 347-48. The effect of the Court's holding that states may not impose liability without fault on publishers and broadcasters of defamatory falsehoods is to sanction a simple negligence standard as complying with the minimum

requirements of the First and Fourteenth Amendments.[13]

As a further limitation upon the right of private individuals to recover in libel actions against publishers or broadcasters of defamatory falsehoods, the Court held in *Gertz* that a private individual "who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury." 418 U.S. 323 at 350. In so holding, the Court explained that the states' interest in protecting the reputation of its citizens becomes more attenuated in the field of presumed and punitive damages, and the discretion of juries to award substantial sums as punitive damages poses a serious threat to the constitutional values of free speech and press.

The limitations imposed in *Gertz* upon the states' right to secure compensation for injuries to reputation represent a minimum standard which the states are constitutionally bound to adopt. However, states retain the right to provide additional safeguards for the constitutional guarantees of free speech and press. Since *Gertz* was decided, two states have extended the *New York Times* standard to cover private individuals involved in matters of public concern. *Walker v. Colorado Springs Sun, Inc.*, Colo., 538 P.2d 450 (1975), *cert.*

---

[13]Mr. Justice Blackmun's concurring opinion in *Gertz v. Welch, supra*, stated that "the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard." 418 U.S. 323 at 353. Also, Mr. Justice Powell's concurring opinion in *Time, Inc. v. Firestone*, ____ U.S. ____, 96 S. Ct. 958, 970 (1976), clearly implied that proof of simple negligence satisfies the minimal constitutional requirements: "Thus, while a State may elect to hold a publisher to a lesser duty of care, there is no First Amendment constraint against allowing recovery upon proof of negligence."

denied, ____ U.S. ____ (1976) (adopting a slightly modified version of the *New York Times* standard); *Aafco Heating & Air Con. Co. v. Northwest Pub., Inc.*, 321 N.E.2d 580 (Ind. App. 1974), *cert. denied*, 96 U.S. 1112 (1976). With respect to defamatory falsehoods about private individuals and relating to matters of legitimate public concern New York has adopted a "grossly irresponsible conduct" standard of liability. *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569 (1975). However, the majority of courts in other jurisdictions where the question has been decided have adopted negligence as the standard of liability in defamation actions by all private individuals. *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co.*, 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); *Cahill v. Hawaiian Paradise Park Corporation*, 543 P.2d 1356 (Hawaii 1975); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); *Gobin v. Globe Publishing Company*, 216 Kan. 223, 531 P.2d 76 (1975); *Jacron Sales Co., Inc. v. Sindorf*, 350 A.2d 688 (Md. 1976); *Stone v. Essex County Newspapers, Inc.*, Mass., 330 N.E.2d 161 (1975); *Taskett v. King Broadcasting Company*, Wash., 546 P.2d 81 (1976).

The shortcomings of the *New York Times* standard are widely recognized. In order to recover in a defamation action under the *New York Times* standard a plaintiff must produce "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson, supra*, at 731. The Supreme Court has noted the deficiencies of this strict standard:

> "It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he

published the statement in good faith and unaware of its probable falsity." 390 U.S. 727 at 731.

The *New York Times* standard, of course, relates only to "public officials" and "public figures." Private individuals, on the other hand, whether engaged in matters of public concern or not, involve quite different considerations. The First Amendment interest in vigorous reporting of the activities of "public officials" is clearly more compelling than the interest in reporting activities of private individuals because "[c]riticism of government is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer, supra*, at 85. Furthermore, application of the *New York Times* standard to "public figures" may be justified on the grounds that the state has a less substantial interest in protecting persons who have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods.[14] In contrast, private individuals are more deserving of protection because, as a class, they are less likely to seek public attention and comment. We therefore decline to extend the *New York Times* standard to actions by private individuals seeking to recover compensation for actual injuries.

We also decline to adopt an intermediate standard of liability such as gross negligence because it would not provide demonstrably greater protection to the media from self-censorship than a standard of ordinary negligence. The distinction between ordinary negligence and gross negligence in the defamation context is not entirely clear, and it is doubtful that the choice of one label rather than the other will significantly affect the

[14]"Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Gertz v. Welch, supra*, at 345.

evolution of constitutional defamation law. Limitations upon the right of recovery in defamation actions that are deemed necessary to protect publishers and broadcasters from an unreasonable degree of liability will undoubtedly be adopted by the courts regardless which label is used.

We hold that a private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false. In addition, the liability of a publisher or broadcaster of a defamatory falsehood about a private individual may not be predicated upon "a factual misstatement whose content [would] not warn a reasonably prudent editor or broadcaster of its defamatory potential." *Gertz v. Welch, supra*, at 348.[15]

The negligence standard of liability coupled with the "actual injury" requirement established in *Gertz* provides a useful beginning point for the development of

[15]The Court added the following caveat in *Gertz*: "Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." 418 U.S. 323 at 348. We interpret the caveat to mean that *no* liability may be predicated upon a statement whose content would not warn a reasonably prudent editor or broadcaster of its defamatory potential. *See* RESTATEMENT (Second) OF TORTS, §5808, comment c at 28-9 (Tent. Draft No. 21, 1975). An editor or broadcaster who has taken reasonable precautions to assure that his statements will not be injurious to reputation is no less deserving of protection from libel actions than one who had made a reasonable inquiry to determine the truth of his statements. With respect to the instant case, the summary judgment proof fails to establish that the allegedly libelous statements were insufficient to warn a reasonably prudent editor or broadcaster of their defamatory potential.

constitutional defamation law and has the capability of achieving a fair balance between the competing interests at stake. In light of our adoption of a negligence standard in defamation actions instituted by private individuals such as Foster, the summary judgment rendered in favor of the Newspaper must be reversed. The Newspaper's motion for summary judgment sought to establish the applicability of the *New York Times* standard to Foster as a "public official" or "public figure" and then to negate the existence of any fact issue with respect to the *New York Times* standard. The Newspaper has not asserted a right to summary judgment upon a negligence standard. We therefore find it unnecessary to determine whether the summary judgment proof negated the existence of any fact issues with regard to negligence or to further elaborate upon the negligence standard adopted today.

The judgments of the trial court and of the court of civil appeals are reversed and the cause is remanded for trial.

SAM D. JOHNSON
Justice

Dissenting opinion by Justice Pope.

OPINION DELIVERED: July 14, 1976